Supreme Court, U. S.
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-673

PROVIDENCE JOURNAL COMPANY,
PETITIONER,

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
RESPONDENTS,

RAYMOND L. S. PATRIARCA,

INTERVENOR-RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The Providence Journal Company respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit, reported at 602 F. 2d 1010, is reproduced in the Appendix hereto ("App.") at A. The opinion of the United States District Court for the District of Rhode Island is reported at 460 F. Supp. 778 and reproduced at App. B. The

District Court's "Opinion on Preliminary Legal Issues," reported at 460 F. Supp. 762, is reproduced at App. C.

Jurisdiction.

The judgment of the Court of Appeals was entered July 27, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented.

Whether records of warrantless electronic surveillance conducted by the FBI as part of a probe of organized crime prior to the effective date of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, are exempt from disclosure in their entirety under Exemption 7(C) of the Freedom of Information Act on the ground that Title III constitutes a binding Congressional determination of nondisclosure, even though Title III has been held nonretroactive and even though the court below refused to consider the strong public interests favoring disclosure?

Statutes.

Relevant portions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510-2520, are reproduced at App. D and App. E, respectively.

Statement of the Case.

Between March of 1962 and July of 1965 the Federal Bureau of Investigation ("FBI") conducted electronic surveillance of Respondent-Intervenor Raymond L. S. Patriarca by means of a microphone hidden on the premises of the National Cigarette Service in Providence, Rhode Island. The purpose of this surveillance was to gather criminal intelligence with respect to organized crime. *United States* v. *Taglianetti,* 274 F. Supp. 220, 223 (D. R.I. 1967), *aff'd,* 398 F. 2d 558 (1st Cir. 1968), *aff'd per curiam,* 394 U.S. 316 (1969). The surveillance was conducted without a warrant.* FBI agents tape-recorded conversations, compiled logs and memoranda summarizing the conversations, and erased the tapes.

On November 1, 1976, Petitioner, the Providence Journal Company ("Journal"), a daily newspaper of general circulation, requested the FBI to release the logs and memoranda under the FOIA. The FBI denied the request on the basis of Exemption 7 of the FOIA, 5 U.S.C. § 552(b)(7), which pertains to law enforcement investigatory records.** In August

* There is no evidence in the record as to whether the surveillance violated the Fourth Amendment. In the case of *United States* v. *Taglianetti, supra,* which involved the prosecution of one of Mr. Patriarca's associates for tax fraud (App. C, at 59; see also 114 Cong. Rec., pt. 10, at 12993), the Justice Department stated that the Patriarca surveillance violated the Fourth Amendment. At the time of the Patriarca surveillance, warrantless electronic surveillance violated the Fourth Amendment only if conducted pursuant to a trespass. See *Lopez* v. *United States,* 373 U.S. 427, 438-39 (1963).

** The FBI initially denied the request on the basis of FOIA Exemptions 7(A), (C) and (D), which apply where disclosure of law enforcement investigatory records would, respectively, wrongly interfere with enforcement proceedings, constitute an unwarranted invasion of personal privacy, and divulge a confidential source. The Journal filed an administrative appeal, and when no answer was forthcoming within 20 days, the Journal filed the present action. Subsequently, the Attorney General affirmed the FBI's denial, although solely on the basis that disclosure of the surveillance records would constitute an unwarranted invasion of personal privacy under Exemption 7(C). The Attorney General's affirmance is reproduced at App. F.

of 1977 the Journal filed an FOIA suit in the United States District Court for the District of Rhode Island seeking access to the logs and memoranda. Patriarca moved to intervene, assertedly in order to raise issues under the Fourth Amendment and FOIA Exemption 6, 5 U.S.C. § 552(b)(6). His motion was granted.

The district court then raised, *sua sponte,* a number of preliminary legal issues, including the question whether release of the documents would be precluded by Title III and FOIA Exemption 3 (5 U.S.C. § 552(b)(3)), which provides that materials specifically exempted from disclosure by other federal statutes are not subject to the disclosure requirements of the FOIA.* Following the submission of briefs in which the parties agreed that Title III was not to be given retroactive effect, the district court decided that Exemption 3 and Title III did not preclude disclosure of the records. The court reasoned that because the surveillance had been conducted and the records compiled prior to the effective date of Title III, and because Title III had no retroactive effect, the records were not obtained "in violation of" Title III and therefore were not subject to Title III's nondisclosure provision.** App. C, at 67-71.

Subsequently, pursuant to stipulation, the Government submitted the records to the district judge for *in camera* inspection, and all parties moved for summary judgment. These motions focused upon the applicability of FOIA Ex-

* The Government had not invoked Exemption 3 during the administrative process and neither the Government nor Patriarca had relied upon it in answering the complaint in the district court.

** 18 U.S.C. § 2511(1)(c). The district court also rejected Patriarca's argument that the existence of a Fourth Amendment violation would preclude disclosure, deciding that the public interest in disclosure outweighed any interests in nondisclosure and, alternatively, that Patriarca had waived any Fourth Amendment claims. App. C, at 71-83.

emption 7(C): the Government and Patriarca contended that nondisclosure of the records was justified by FOIA Exemption 7(C), because disclosure would constitute an "unwarranted invasion of personal privacy;"* the Journal contended that Exemption 7(C) was inapplicable because the public interest in disclosure outweighed any personal privacy interest in nondisclosure.

In October of 1978 the district court issued an opinion and order disposing of these summary judgment motions. The district court found that the records fell into three categories: (i) those records containing information about Patriarca's health, family life, and religious beliefs; (ii) those containing information about "dealings with public officials and public figures in matters which may be legal and/or illegal"; and (iii) those containing code names or numbers of FBI agents and informants. App. B, at 44. The district court granted summary judgment in favor of the Government and Patriarca with respect to the first and third categories and in favor of the Journal with respect to the second category.

In determining whether disclosure of the records would constitute an unwarranted invasion of personal privacy under Exemption 7(C), the district court adhered to the analysis followed by every other court that has ever applied Exemption 7(C) or the similarly worded Exemption 6—the court balanced the public interest in disclosure against the personal privacy interest in nondisclosure. With regard to the first and third categories of documents, the court held that the interests in nondisclosure prevailed and entered

* The Government also asserted Exemption 6, and Patriarca asserted Exemptions 6 and 4. The district court held Exemption 6 inapplicable because the records were investigatory files rather than medical, personnel or other files. The court held Exemption 4 inapplicable as protecting certain financial interests not involved in the present case. App. B, at 30 n.3. The appeals court did not reach the applicability of either of these other Exemptions.

summary judgment in favor of the Government and Patriarca. With regard to the second category of documents—those revealing dealings between Patriarca and public officials—the court held that the public interest in disclosure outweighed any privacy interest and entered summary judgment in favor of the Journal. App. B, 44-57.

On appeal by the Government and Patriarca, the First Circuit reversed and entered judgment against the Jounal *on a ground that had not been urged or briefed by any of the parties at any stage of the litigation.* The First Circuit held that even assuming Title III was not retroactive, the statute constituted a binding Congressional determination that the privacy interest of a target of electronic surveillance conducted in violation of the Fourth Amendment* was too great to permit any disclosure, and that this Congressional determination foreclosed balancing under Exemption 7(C) of the FOIA of interests favoring disclosure. App. A, at 23.

Reasons for Granting the Writ.

1. THE ENORMOUS PUBLIC INTEREST IN THE OUTCOME OF THIS LITIGATION CALLS FOR THE GRANTING OF CERTIORARI.

The public interest in disclosure of the surveillance records involved in this case is enormous. The interests favoring disclosure, as found by the district judge, include the following: (i) the interest in honest and efficient government which was the basis for the general disclosure mandate of FOIA; (ii) express Congressional approval of the Justice Department

* The court indicated that the Patriarca surveillance violated federal law as well as the Constitution. App. A, at 25. The federal statute applicable at the time the surveillance was conducted, § 605 of the Federal Communications Act (47 U.S.C.), applied only to wiretapping and not to electronic eavesdropping.

policy of disclosing investigatory records of historic interest and more than fifteen years old; (iii) the Journal's ability, as a newspaper, to broadly disseminate to the public information about "alleged widespread corruption of public officials by organized crime"; (iv) the Journal's intention to develop the information by investigative reporting; (v) the diminished privacy rights of public officials generally, and especially those who associate with known criminals; (vi) Patriarca's diminished privacy interest after decades of public notoriety and criminal prosecutions; and (vii) the public interest in disclosure of information which "may be interpreted as revealing a conspiratorial hierarchy of crime."* App. B, at 45-49.

In the letter denying the Journal's administrative appeal, the Deputy Attorney General himself conceded that the "public interest in the release of these materials [is] substantial" and that the Journal "would serve as a conduit for the transmittal of this information to the public." App. F, at 121-122. Disclosure of these records may be the first step in exposing widespread corruption in state and local governments in the New England states.** The records are the only known source of this information. App. B, at 46.

* The Senate, in the course of debating Title III, considered the portion of the Patriarca surveillance records released in connection with the *Taglianetti* case, *supra*, and had no doubt they revealed a conspiratorial hierarchy of crime. See, *e.g.*, 114 Cong. Rec., part 10, at 12986, 12993.

** This probability is supported by the report of the President's Commission on Law Enforcement and the Administration of Justice, "The Challenge of Crime in a Free Society" (1967). The Commission found that "organized crime flourishes only where it has corrupted local officials" (*id.*, at 191), that Rhode Island was one of eight states in which "the wealthiest and most influential core groups" of organized crime operated (*id.*, at 192), and that the "activities [of organized crime] in New England are controlled from Rhode Island." *Id.* These conclusions are also supported by

The public interest in disclosure of records such as these was one of the basic interests that led to the enactment of the FOIA. For example, the legislative history of the FOIA states:

> "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies." H.R. Rep. No. 1497, 89th Cong., 2d Sess., at 12 (1966).
> "Although the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for that information. S. Rep. No. 813, 89th Cong., 1st Sess., at 3 (1965).

A similar motivation prompted the enactment of Title III, largely in response to studies such as the Report by the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society" (1967) ("Crime Report"). That Report analyzed the pervasive influence of organized crime, concluded that educating the public was the primary remedy for subversion of political institutions by organized crime, and stated that in many cases the press was the public's only source of information about organized crime. Crime Report, at 208-09.*

Few interests are more important to the proper functioning of democratic government than exposure of a criminal organization operating within the community and of its

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the portions of the records released in the *Taglianetti* case and published as an appendix to the statement of Professor G. Robert Blakey in support of Senate Bill No. 917 which became Title III. 113 Cong. Rec., part 16, at 21765-67, 21770-75 (1967).

* See also the Report of the Task Force on Organized Crime of the National Advisory Committee on Criminal Justice Standards and Goals, "Organized Crime" at 4, 10, 80, 85 (1976).

dealings with elected officials and community leaders; few cases more directly affect this interest than the present one. The magnitude of the public interest in disclosure alone justifies review of the First Circuit's holding, which frustrates this interest unnecessarily.

2. THE FIRST CIRCUIT ERRED IN DETERMINING THAT THE CONGRESSIONAL INTENT BEHIND TITLE III PRECLUDED CONSIDERATION OF INTERESTS FAVORING DISCLOSURE UNDER FOIA EXEMPTION 7(C).

The First Circuit's decision is based entirely upon a misapplication of FOIA Exemption 7(C) and a misinterpretation of the legislative intent behind Title III. That the court rested its decision upon a ground not argued or briefed by any of the parties at any stage in the litigation undoubtedly contributed to the error.

Every other court that has applied Exemption 7(C) of the FOIA has balanced the public interest in disclosure against the personal privacy interest in nondisclosure. See App. A, at 23. The refusal of the First Circuit to apply this balancing analysis is a gross deviation from accepted doctrine, is contrary to a decision of the Supreme Court* and violates the explicit language of the FOIA.** This holding was based upon reasoning that was never argued or briefed by any of the parties at any point in this litigation: *i.e.*, that Congress had previously balanced the interests involved in this case by enacting Title III. App. A, at 23.

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* See *Department of the Air Force* v. *Rose*, 425 U.S. 352, 360-361 (1976).

** The FOIA permits nondisclosure only where disclosure would constitute an "unwarranted" invasion of personal privacy (5 U.S.C. § 552(b)(7)), and the statute gives the Government the burden of proving that an invasion of personal privacy is "unwarranted." 5 U.S.C. § 552(a)(4)(B).

Contrary to the holding of the First Circuit, the legislative intent behind Title III mandates disclosure of the records involved in this case. It is undisputed that the surveillance of Patriarca was conducted by the FBI as part of an intensive nationwide investigation of organized crime (Brief for the Federal Appellants before the First Circuit, at 57; *United States* v. *Taglianetti, supra,* 274 F. Supp. at 223) and that the surveillance in fact revealed the operations of a family of organized crime. See App. B, at 44, 46-49; 113 Cong. Rec., part 16, at 21765-67, 21770-75 (1967). There is not a single indication in the entire legislative history of Title III that Congress had the slightest concern about invasions of the privacy of organized criminals or those who dealt with them.

The major premise of the First Circuit's opinion was that Title III had the dual purpose of protecting privacy and delineating a uniform basis for the interception of communications. App. A, at 20. However, the Congressional concern for the protection of privacy was not based upon any evidence of abuses of electronic surveillance by law enforcement officers; rather, Congress was concerned with invasions of privacy committed by private parties using electronic surveillance in industrial espionage, labor disputes, and domestic relations cases.* In response to these invasions of legitimate privacy interests, Congress enacted Title III's absolute prohibition against the possession of electronic surveil-

* See 114 Cong. Rec., part 9, at 11231, and part 11 at 14695 (1968) (remarks of Senator McClellan, the floor manager of the bill, and Senator Hruska, who had introduced S. 2050 which was substantially similar to Title III); *id.*, part 11, at 14762-64 (remarks of Senator Percy); *id.*, at 14480 (remarks of Senator Tydings). In addition, the Senate Committee Report stated: "[T]he danger that law enforcement officials may listen in on conversations that do not concern some criminal enterprise is exceedingly remote." S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), 1968 U.S. Code Cong. & Admin. News, at 2160.

lance devices by persons other than law enforcement and communications officials. 18 U.S.C. § 2512.

Congress clearly intended to *promote* the use of electronic surveillance of organized crime by law enforcement officials. As stated in the Senate Committee Report: "The major purpose of title III is to combat organized crime." S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) ("Committee Report"), 1968 U.S. Code Cong. & Admin. News, at 2157. The Committee Report noted the recent growth of organized crime, its pervasive involvement in narcotics distribution, gambling, loan-sharking, and its invasion of previously legitimate business and union activities; but the Committee Report focused upon the special danger to democratic political institutions resulting from the involvement of public officials and community leaders with organized crime:

> "Organized crime flourishes best only in a climate of corruption. Today's corruption is less visible, more subtle, and therefore, more difficult to detect and assess than the corruption of earlier times. With the expansion of governmental regulation of private and business activity, the power to corrupt has given organized crime greater control over matters affecting the everyday life of each of us. At various times, it has been the dominant political force in such metropolitan centers as New York, Chicago, Miami, and New Orleans. Political leaders, legislators, police officers, prosecutors, and judges have been tainted by organized crime, and the public is the victim because there can be no true liberty or justice under a corrupt government." *Id.*, at 2158.

The Committee Report concluded that because organized crime conducted its business almost exclusively by telephone rather than on paper, and because of the intimidation of persons who had the knowledge to speak out about the activities of organized crime, "intercepting the communications of

organized criminals is the only effective method of learning about their activities." *Id.*, at 2159. The controls imposed by Title III upon the use of electronic surveillance by law enforcement officials were designed not to protect the privacy of organized criminals but solely to comply with the Constitutional requirements delineated in *Berger* v. *New York*, 388 U.S. 41 (1967); Congress thereby ensured that the products of the surveillance would be admissible in criminal prosecutions of organized criminals. Committee Report, *supra*, 1968 U.S. Code Cong. & Admin. News, at 2153, 2161-63; see 114 Cong. Rec., part 10, at 12986.

As noted by the First Circuit, the Senate was aware of the Patriarca surveillance at the time it debated and enacted Title III. App. A, at 20 n.4. A description of the surveillance, together with the surveillance records disclosed in connection with the *Taglianetti* case, was submitted to the Senate as part of the statement of Professor G. Robert Blakey in support of the wiretapping bills. 113 Cong. Rec., part 16, at 21765-67, 21770-75 (1967). A second description of the surveillance was contained in a magazine article entitled "The Mob" printed in the Congressional Record in support of the wiretapping bills. 114 Cong. Rec., part 10, at 12993.*

* In addition to the description of the surveillance, the article stated: "At 59, Patriarca has two distinctions in Cosa Nostra. *When it comes to manipulating the makers and enforcers of the law, he has few peers.* His tightly disciplined 150-member gang operates a dazzling array of rackets and legitimate businesses over Massachusetts, Rhode Island, Connecticut and Maine. . . . As a Mob Boss, Raymond Patriarca sits as something of a judge himself, sometimes over the affairs of politicians. On one such instance, in 1963, a top official of the Rhode Island state government, much in Patriarca's debt, had been defeated for reelection. [The article then describes Patriarca's resolution of a dispute between the politician and a businessman as to whether a campaign contribution was a gift or a loan]." 114 Cong. Rec., part 10, at 12993 (emphasis added).

Finally, Senator Tydings described the surveillance during the Senate debates on the wiretapping bills and stated:

> "Under the bill before us, with a proper showing of probable cause and close judicial supervision, this surveillance could have been used to indict and convict Mr. Patriarca. That he cannot be held responsible for all his criminal activities, with all that we know, is incredible.
>
> "Moreover, at least one murder might have been prevented. During the 3 years that the FBI was monitoring the activities of Mr. Patriarca, it was able at least six times to prevent the murder of William Marfeo. After July 1965, when the device was removed by order of the Attorney General, Marfeo was killed.
>
> "We must change the law to change this result." 114 Cong. Rec., part 10, at 12986.*

However, despite the repeated references to the Patriarca surveillance and the disclosure of the surveillance records in the *Taglianetti* case, not a single Senator or Representative suggested that these actions constituted unjustified invasions of privacy or, indeed, that they violated any *legitimate* privacy interests whatever.

On the contrary, the legislative history supports the proposition that disclosure of the surveillance records in this case would be entirely consistent with the Congressional intent behind Title III. First, although Congress was aware that the FBI had conducted, until July of 1965, an extensive warrantless electronic surveillance program largely in violation of Fourth Amendment standards, Title III did *not* prohibit disclosure of surveillance records gathered in violation

* The House debates on the wiretapping bills also contain expressions of disapproval of the termination of the electronic surveillance program against organized crime. See 114 Cong. Rec., part 15, at 20119 (remarks of Rep. Poff).

of the Fourth Amendment—it merely prohibited disclosure of information "obtained . . . in violation of this subsection." 18 U.S.C. § 2511(1)(c).* Congress did not make Title III retroactive, and the courts have not given it retroactive effect. See App. C, at 69-70.

Second, while Title III provided a damages remedy, injunctive relief against violations of the statute, including wrongful disclosures, was expressly prohibited. Committee Report, *supra*, 1968 U.S. Code Cong. & Admin. News, at 2196; see 18 U.S.C. § 2520.

Third, although Title III was aimed primarily at ensuring that information gathered through electronic surveillance would be admissible in criminal prosecutions of organized crime figures, the drafters of the statute were heavily influenced by the recommendations of the Report by the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society" (1967),** which concluded:

> "Especially in smaller communities, *the independence of the press may be the public's only hope of finding out about organized crime.* Public officials concerned about organized crime are encouraged to act when comprehensive newspaper reporting has alerted and enlisted community suport.
>
> "*The Commission recommends:*
>
> * * *

* Prior to *Katz* v. *United States*, 389 U.S. 347 (1967), warrantless surveillance violated the Fourth Amendment only if it involved a trespass. Thus, nontrespassory pre-1967 warrantless surveillance would have satisfied the applicable Fourth Amendment requirements yet still have violated Title III, had the statute been made retroactive.

** See, *e.g.*, Individual Views of Messrs. Dirksen, Hruska, Scott, and Thurmond on Titles I, II, and III, 1968 U.S. Code Cong. & Admin. News, at 2274, 2284. The Report was cited repeatedly throughout the debates on Title III.

> Newspapers in smaller communities dominated by organized crime should fulfill their responsibility to inform the public of the nature and consequence of these conditions." *Id.*, at 208 (emphasis added).

Fourth, Congress endorsed disclosure of information gathered even from unlawful electronic surveillance in certain circumstances.* Congress did not accept the arguments and proposed amendments favoring blanket prohibitions against disclosure of information gathered from unlawful electronic surveillance.**

Finally, disclosure of the records involved in this case will be subject to judicial controls substantially identical to those imposed by Title III. The function of the inventory requirement of Title III (18 U.S.C. § 2518(8)(d)), to protect the privacy of *innocent* conversations and parties and limit the discretion of law enforcement officers with regard to the use of the information (see *Berger* v. *New York*, 388 U.S. 41, 60 (1967)), was fulfilled in the present case by the submission of the records to the district court for review.

In sum, the First Circuit concluded erroneously and without benefit of briefs or argument that Congress, by enacting Title III, intended that a target of unlawful electronic surveillance has an interest in nondisclosure of intercepted communications that prevails over the public interests in disclosure, regardless of the strength of those public in-

* Committee Report, *supra*, 1968 U.S. Code Cong. & Admin. News, at 2188.

** In support of a proposed amendment striking Title III in its entirety, Senator Long argued that Title III would permit disclosure of unlawfully intercepted communications. The Senate rejected both the amendment and the argument. 114 Cong. Rec., part 11, at 14711, 14716. In addition, the Senate did not adopt Amendment 764, proposed by the Justice Department, which would have prohibited disclosure of unlawfully intercepted communications in all circumstances. *Id.*, at 14721.

terests. The gravity of the First Circuit's misapplication of FOIA Exemption 7(C) and misinterpretation of the Congressional intent behind Title III, together with the magnitude of the public interests in disclosure which the court refused to consider, make this case particularly appropriate for review.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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Appendix A.

United States Court of Appeals
For the First Circuit

Nos. 79-1056, 79-1067

PROVIDENCE JOURNAL COMPANY,
PLAINTIFF, APPELLEE,
v.
FEDERAL BUREAU OF INVESTIGATION, et al.,
DEFENDANTS, APPELLANT.

RAYMOND L. S. PATRIARCA,
DEFENDANT-IN-INTERVENTION-APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[HON. RAYMOND J. PETTINE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL, *Circuit Judge*,
MURRAY, *Senior District Judge.**

William M. Kunstler and *Harris L. Berson*, with whom *Paul J. DiMaio*, was on brief, for intervenor-appellant.
Michael Jay Singer, Attorney, Civil Division, Appellate Staff, Department of Justice, with whom *Barbara Allen Babcock*, Assistant Attorney General, *Paul F. Murray*, United States Attorney, *Leonard Schaitman* and *Vincent M. Garvey*, Attorneys, Civil Division, Appellate Staff, Department of Justice, were on brief, for Federal appellants.
Matthew F. Medeiros, with whom *Joseph V. Cavanagh, Jr.*, was on brief, for appellee.

July 27, 1979

COFFIN, *Chief Judge*. Between March of 1962 and July of 1965 defendant-appellant, the Federal Bureau of Investiga-

* Of the District of Massachusetts, sitting by designation.

tion (FBI), conducted electronic surveillance of Raymond Patriarca's business office. The surveillance violated the Fourth Amendment. FBI agents recorded conversations, and compiled logs and memoranda from the tapes before erasing them. The resulting 2000 documents, consisting of over 7000 pages of summaries of the conversations, are the subject of this litigation.

In November, 1976, plaintiff-appellee, the Providence Journal Co., wrote to the Attorney General asking for release of the documents under the Freedom of Information Act (FOIA). In June, 1977, the director of the FBI denied the request in its entirety, relying on three subsections of Exemption 7 of the FOIA, 5 U.S.C. § 552(b)(7)(A), (C), and (D). The Journal's appeal to the Justice Department went unanswered for over 20 days, and in August of 1977, the Journal exercised its right to consider its administrative remedies exhausted and to file this action in the district of Rhode Island, 5 U.S.C. § 552(a)(6)(A)(ii) and (C). Subsequently the Attorney General affirmed the FBI's decision, but relied on only Exemption 7(C).

The district court issued a preliminary decision in which, *inter alia,* it granted Patriarca's motion to intervene; and ruled that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), 18 U.S.C §§ 2510-2520, is a specific statutory exemption under Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3);[1] but decided that Title III is inapplicable because it has no retroactive effect.[2] 460 F. Supp. 762 (D. R.I. 1978).

In its final decision the court divided the requested information into three categories:

> "1) Matters relating to Mr. Patriarca's private life, and the private lives of his family members who are still living, *i.e.* his health, as well as that of his family, personal and religious beliefs and the like.
>
> "2) Dealings with public officials and public figures in matters which may be legal and/or illegal.
>
> "3) The names and code names or numbers of FBI agents and informants." 460 F. Supp. 778, 789 (D. R.I. 1978).

Applying Exemption 7(C), the court balanced privacy interests against the public interest in disclosure. It held that categories (1) and (3)[3] were protected, but that category (2) was not. The district court refused to stay its judgment pending appeal, but we granted intervenor's motion for a stay in order to maintain the status quo. 595 F.2d 889 (1st Cir. 1979).

We begin our analysis with Title III, Congress' treatment of the problems created by electronic surveillance. We do so

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[1] Appellee has not appealed this conclusion, and we need not address it. Exemption 3 states that the FOIA "does not apply to matters that are . . . specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3).

[2] Our analysis spares us the task of deciding the retroactivity issue. We note, though, that the case on which the district court relied, *United States* v. *American Radiator & Standard Sanitary Corp.,* 288 F. Supp. 701, 707 (W.D. Pa. 1968), and other cases in accord, *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.,* 291 F. Supp. 247, 250 (E.D. Pa. 1968); *People* v. *Daria,* 38 App. Div.2d 833, 329 N.Y.S.2d 647, 648 (1972), are different from this case in that the issue was whether to suppress information in a criminal proceeding, and the surveillance was legal before Title III.

[3] The district court qualified its holding as to category (3) by saying that appellee could renew its request for such information at a later time and by saying that persons now deceased have no protectible privacy interest. We need not address these issues.

because of what we deem to be its compelling significance, not as a statutory exemption under Exemption 3, but in affecting the balancing process to determine whether, under Exemption 7(C), production of records would constitute an "unwarranted invasion of personal privacy". 5 U.S.C. § 552(b)(7)(C).

Title III "has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. Rep. 1097, 90th Cong., 2nd Sess., 1968 Code Cong. & Adm. News 2112, 2153. Congress, concerned about the "tremendous scientific and technological developments" which "seriously jeopardized" the "privacy of communication" to the point where "[e]very spoken word . . . can be intercepted . . . and turned against the speaker", *id.* at 2154, created a "comprehensive scheme" intended "strictly to limit the employment of those techniques." *Gelbard* v. *United States,* 408 U.S. 41, 47 (1972). "[T]he protection of privacy was an overriding congressional concern." *Id.* at 48. "The Act represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression." *United States* v. *United States District Court,* 407 U.S. 297, 302 (1972).[4]

The cornerstones of this comprehensive scheme are strict regulation of the use of electronic surveillance and strict regulation of the use to which information gathered through electronic surveillance may be put. Manufacture and possession of the necessary devices are controlled. 18 U.S.C. §§ 2512, 2513. Mandatory procedures are established for procuring authorization to conduct electronic surveillance. 18 U.S.C. §§ 2512, 2513. Mandatory procedures are established for procuring authorization to conduct electronic surveillance. 18 U.S.C. §§ 2516, 2518. Limits are placed on the use to which intercepted information, even if legally obtained, may be put. 18 U.S.C. §§ 2515, 2517. Congress must be informed of all use of electronic surveillance. 18 U.S.C. § 2519. Finally, Congress has set out criminal and civil penalties for violation of Title III. 18 U.S.C. §§ 2511(1), 2520.

Though Congress clearly sought to deter unwarranted invasions by denying the perpetrators the fruits of illegal surveillance, it did not stop at the limits of the exclusionary rule. Instead, it made Title III remedial. It forbade any disclosure of illegally intercepted information, made such disclosure criminal, and gave the victim of any illegal interception a civil cause of action without regard to the nature of the information intercepted, the occurrence of disclosure, or the sustaining of actual damages. Congress' recognition of the victim's privacy as an end in itself, *Application of the United States,* 413 F. Supp. 1321, 1332 (E.D. Pa. 1976), recognizes that the invasion of privacy is not over when the interception occurs, but is compounded by disclosure. *See Gelbard* v. *United States, supra,* 408 U.S. at 51-52. Thus "production of such records", to use 7(C)'s language, is another offense to the victim, and is barred. Congress has, in the clearest way, thus decided that the privacy interest of a victim of illegal electronic surveillance is too great to permit any disclosure at all.[5]

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[4] The Senate was aware of the Patriarca surveillance, and at least one Senator urged passage of Title III out of frustration that the surveillance could not be used against Patriarca in court. He contended that "with a proper showing of probable cause and close judicial supervision" surveillance could help convict Patriarca. 114 Cong. Rec. 12986 (1968) (remarks of Sen. Tydings).

[5] Title III's policy of nondisclosure has even been held strong enough to overcome the Sixth Amendment's policy of public access to criminal proceedings in certain circumstances. *United States* v. *Cianfrani,* 573 F.2d 835 (3d Cir. 1978).

The focus of the parties and the district court was so exclusively centered, insofar as consideration of Title III was concerned, on whether it could fit within Exemption 3 that Title III lost all significance once retroactivity was decided. The very bifurcation of these proceedings may have contributed to this restricted focus, since Title III had been shunted off stage before analysis under Exemption 7(C) began. This, we feel, led to error. Though the standard of review normally may be abuse of discretion, under the peculiar circumstances of this case, we think the error was one of law, in according no weight to a deliberate policy statement of Congress relating to the precise circumstances we face here.

Exemption 7(C) permits an agency to withhold "matters that are . . . investigatory records compiled for law enforcement purposes, but only to the extent that production of such records would . . . constitute an unwarranted invasion of personal privacy". 5 U.S.C. § 552(b)(7)(C). In order to properly balance an individual's right to privacy against the public interest in disclosure, a court must interpret the phrase "unwarranted invasion of personal privacy". Other legislation in which Congress sheds light on the meaning of the phrase should not be ignored. Statutes addressing the same subject should be read consistently. *Kokoszka* v. *Belford,* 417 U.S. 642, 650 (1974). A strict rule confining the relevance of other statutes in FOIA cases to Exemption 3 would work against this basic tenet of statutory interpretation. There is no reason for us to think that what Congress in 1968 considered so unwarranted an invasion of privacy that its fruits should be kept secret would not still be so considered in 1974 when Congress created Exemption 7(C).[6]

[6] Indeed the same Senator who sponsored 7(C), Senator Hart, opposed Title III because he felt that it could not adequately protect personal privacy. 114 Cong. Rec. 14160-61 (1968).

In short, Congress, by passing Title III, has already balanced the same kind of factors that must be balanced under Exemption 7(C). Congress had decided that the risk to privacy created by illegal electronic surveillance is too great to permit any disclosure of the fruits of such surveillance. Here the FBI has conceded that the surveillance was "in willful and flagrant violation of the Constitution and applicable Federal Law." The FBI did not get a warrant or consent for the surveillance, and the breadth of the surveillance in terms of time and extent was unreasonable. 460 F. Supp. at 770 & n. 19. This intrusion could not be legal before or after Title III. In fact, this was exactly the kind of "insidious invasion of privacy" that Congress "singled out for special scrutiny and safeguards." *In re Lochiatto,* 497 F.2d 803, 807 (1st Cir. 1974). Intrusions before 1968 were no less insidious than intrusions after 1968, and to the extent reasonable, the victims should be protected from disclosure after 1968 in accord with Congress' stated policy. We hold that Congress' deliberate balancing under Title III is controlling under Exemption 7(C) given the circumstances of this case.

We recognize that our holding is novel in that, as the district court's survey found, no other court has exempted information under Exemption 7(C) or the closely related Exemption 6[7] solely on the ground that the manner in which the information was obtained forbids release", 460 F. Supp. at 786, instead of balancing on the basis of the actual contents of the requested material.[8] One explanation may be that the

[7] Exemption 6 permits an agency to withhold "matters that are . . . personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy". 5 U.S.C. § 552(b)(6).

[8] Some courts have gone beyond analysis of the contents of the requested material to consider the effect of a promise of confidentiality to an informant, but that factor has not been determinative. *See* 460 F. Supp. at 786. One court has said that illegality of collec-

earliest, formative cases were decided under Exemption 6 because it existed for eight years before Exemption 7(C) was enacted. Although the two exemptions protect the same interest, 120 Cong. Rec. 17033 (1974) (remarks of Sen. Hart), Exemption 6 concerns files which are likely to have been compiled with the knowledge and at least implied consent of the subjects. Secret investigations using controversial investigatory techniques are far more likely in connection with law enforcement activities, the subject of Exemption 7. Moreover, the circumstances of this case are unique and present a particularly compelling argument for considering the manner in which the information was obtained. Not only has Congress passed a statute addressing this precise problem, but this manner of obtaining information is particularly likely to collect the kinds of information people are entitled to keep private because electronic surveillance is designed to go forward in even the most intimate, protected surroundings without the subjects having any knowledge that they are being observed. *See* 1968 Code Cong. & Adm. News, *supra,* at 2154. The distinction between focussing on the content of information and on the manner of obtaining it blurs when the very manner of obtaining information carries such a likelihood of discovering private facts.

"[D]isclosure, not secrecy, is the dominant objective of the [FOIA]", *Department of the Air Force* v. *Rose,* 425 U.S. 352, 361 (1976), and Congress has decried the news media's underuse of the FOIA, *see* 460 F. Supp. at 790. But these concerns must give way to Congress' specific protection of this narrow class of information. Our holding is not broad. It

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tion of information does not determine the applicability of Exemption 7(C), but that court was answering an argument that because surveillance of Martin Luther King was illegal the information obtained *should* be released. *Lesar* v. *Department of Justice,* 455 F. Supp. 921, 924 (D. D.C. 1978).

gives agencies no sweeping power to withhold information, and does not create a new, general exemption for illegally obtained information. We are concerned only with the "contents" of "wire" or "oral communications" "intercepted" before June 19, 1968, by means of an "electronic, mechanical, or other device", 18 U.S.C. § 2510(8), (1), (2), (4), and (5), in violation of the Constitution or federal law.[9] Moreover, we need not decide to what extent "aggrieved person[s]", 18 U.S.C. § 2510(11), or a criminal prosecutor might have rights different from the third party which brought this suit. We decide only that the FBI may properly turn down this FOIA request under Exemption 7(C).

Reversed.

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[9] Intervenor suggests that the appropriate narrowing principle is that disclosure should be prohibited when the requested material was obtained by a criminal search, in this case a burglary. Aside from the fact that the record before us does not reveal whether there was a breaking and entering, the Supreme Court has cast doubt on intervenor's argument with *Dalia* v. *United States,* __ U.S. __, 47 U.S.L.W. 4423 (April 18, 1979), in which the Court held that covert entries to plant electronic bugging equipment can be legal if the surveillance is legal.

Appendix B.

PROVIDENCE JOURNAL CO., Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION et al.,
Defendants, and Raymond L. S. Patriarca, Intervenor.

Civ. A. No. 77-0526.

United States District Court,
D. Rhode Island.

Oct. 5, 1978.

Matthew F. Medeiros of Edwards & Angell, Providence, R.I., for plaintiff.

Vincent M. Garvey, Civ. Div., U.S. Dept. Justice, Washington, D.C., Everett C. Sammartino, Asst. U.S. Atty., R.I., Providence, R.I., Harris L. Berson, Providence, R.I., Harvey Brower, Lawrence, Mass., for defendants.

OPINION

Travel of the Case

PETTINE, Chief Judge.

On May 15, 1978 this Court rendered an opinion in this case disposing of five preliminary questions[1] and concluded that:

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[1] 1. Whether the Freedom of Information Act (5 U.S.C. § 552) and the Privacy Act (5 U.S.C. § 552a), when read in light of the Fourth Amendment, require an agency to disclose information which was obtained in violation of that Amendment.

2. Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510 *et seq.*) or prior federal legislation would prevent disclosure of transcripts of conversations obtained through illegal means.

3. Whether the foregoing statute or prior such statutes are included within exemption (b)(3) of the Freedom of Information Act and thus specifically exempt from required disclosure.

4. Whether the public's right to know and the right of the press to publish information of public interest prevails over claims that the information was obtained in violation of the proposed intervenor's rights.

5. Whether Mr. Raymond L. S. Patriarca has a right to intervene in this action and, if so, whether he has standing to raise the above issues.

Mr. Patriarca "has standing to intervene and assert claims arising under the fourth amendment, 5 U.S.C. §§ 552, 552a, 702, 706 (1976) with jurisdiction conferred by 28 U.S.C.A. § 1331 (1976)"; "the electronic surveillance at issue in this case is not exempt from disclosure pursuant to (FOIA) exemption 3 because the specific prohibitions against disclosure in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510, 20 (1976) do not apply retroactively"; "(g)uided by the FOIA standard 'unwarranted invasion of personal privacy', as that clause is given meaning by the developing case law, this Court can strike a a balance between the individual interest in privacy and the public's interest in disclosure, which will be reasonable and which will not breach Mr. Patriarca's constitutionally protected privacy interest"; "Mr. Patriarca (had) forfeited and waived whatever fourth amendment right he had to have the government refrain from disclosing the illegally seized conversations and their fruits"; and that "first amendment interests counsel not the withholding of information but its disclosure". The Court deferred resolution of exemptions, §§ 552(b) 4, 6, 7 and ordered the government to either consent to the preparation of a document index or serve a memorandum of law in opposition thereto.

On June 6, 1978 the plaintiff and defendant stipulated, with approval of the Court, that the document index need not be prepared and that all the documents would be submitted to the Court for *in camera* inspection.

Pursuant to this stipulation the FBI delivered two cartons containing approximately two thousand documents consisting of over seven thousand pages. Subsequently, the plaintiff and defendants submitted cross motions for summary judgment,[2] arguing, respectively, that exemption 7(C)

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[2] The Government also moved to dismiss the Attorney General, the Director of the FBI and the FBI as improper parties to this suit. One court, when faced with a similar motion, described it as "frivolous" and stated that the propriety of suing the head of an agency and the FBI is well established in FOIA suits. *Hamlin v. Kelley,* C.A. No. 77-0526, slip op. at 4-5 (E.D.Ill. June 2, 1977); *cf. Tarnopol v. FBI,* 442 F. Supp. 5 (D.D.C. 1977).

FOIA's jurisdictional provision states that a "district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld . . . ." 5 U.S.C. § 552(a)(4)(B) (1976). The defendants assert that this language establishes the Department of Justice in this case as the exclusive defendant, because it alone is an "agency" as defined by 5 U.S.C. § 551(1). They assert that a majority of courts has concluded that neither an individual officer, *see, e.g., Ott v. Levi,* 419 F. Supp. 750 (E.D.Mo. 1976); *Burke v. Kelley,* C.A. No. 75-336-C3 (D.Kan. Feb. 11, 1976); *Shouse v. Burris,* C.A. No. CV 475-198 (S.D.Ga. Dec. 23, 1975); nor the F.B.I., *see, e.g., La. Rouche v. Kelley,* C.A. No. 75-6010 (S.D.N.Y. Feb. 16, 1977); *Nix v. Dept. of Justice,* C.A. No. 75-935 (D.S.C. May 12, 1976), *aff'd as modified on other grounds* 572 F.2d 998 (4th Cir. 1978); *cf. Health Systems Medical Supply, Inc. v. Blue Cross-Blue Shield,* C.A. No. 77-P-0988-NE (N.D.Ala. Nov. 21, 1977) are proper parties because they are not agencies within the grant of jurisdictional authority.

It may be doubted whether the statutory language establishes the Department as the sole and exclusive properly named defendant. Nonethless, the defendants cogently cite the congressional conference report in which it is stated,

> the definition of "agency" in this subsection is intended to broaden applicability of the Freedom of Information Act but it is not intended that the term "agency" be applied to subdivisions, offices or units within an agency.
> Conference Report H.Rep. 93 1380, 93d Cong., 2d Sess. (1974), *reprinted in* FOIA and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Text and Other Documents (Joint Com. Print) (1975) (hereinafter cited as 1975 Source Book)

Courts have relied on this legislative history in concluding that the FBI, as a subdivision of the Justice Department, may not be sued because it is not within the definition of "agency". *See Johnson v. Dept. of Justice,* C.A. No. 77-2276 (E.D.La. April 25, 1978); *Nix v. Dept. of Justice, supra.*

The effect of this interpretation of the Act of Oct. 21, 1976, Pub.L. No. 94-574, 90 Stat. 2721, (1976) amending, among others, the Administrative Procedures Act, is unclear. In an attempt to facilitate suits against the Government by eliminating formalities in naming party defendants and certain problems of sovereign immunity, Congress legislated that, "If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer." Act of Oct. 21, 1976. Pub.L. No. 94-574, 90 Stat. 2721, § 1, 5 U.S.C. § 703 (1976). It appears that this provision would be inapplicable to this case because FOIA most probably constitutes a "special statutory review proceeding". Yet the Government's instant motion illustrates certain of the ills against which Congress aimed: wasteful motions, sometimes leading to unjust and capricious results, regarding sovereign immunity and improper party defendants, which do not go to the merits or to the proper scope of judicial review or relief. *See* House Report No. 94-1656, 94th Cong., 2d Sess. (1976), *reprinted in* [(1976)] U.S. Code Cong. & Admin. News at 6121.

This case hardly presents facts which warrant decision with regard to who, besides the Department of Justice, may be sued when FBI files are involved. Some circumstances might exist which would require the naming of a defendant other than the Department of Justice in order to bring about that prompt and complete disclosure of information guaranteed by FOIA. Plaintiffs cite the contempt proceedings following *In re United States,* 565 F.2d 19 (2d Cir. 1977) *cert. denied,* 436 U.S. 962, 98 S.Ct. 3082, 57 L.Ed.2d 1129 (1978), as an example of an eventuality which would require the naming of an individual defendant. In this case, there will of course be no difficulty in obtaining compliance with the Court's eventual order. Moreover, any order directed at the

mandates complete disclosure or complete withholding.[3]

I undertook to read the documents in light of the arguments for summary judgment, and after a week of reading a number of these documents, I concluded that no useful purpose would be served in continuing this laborious and time consuming task. All those documents I read sounded the same theme with only slight variations as they involved different individuals and locales. There is no reason to believe the rest of the papers would offer anything new. I have, therefore, concluded that the defendant, *i.e.*, the United States Government, if it sees fit to further object to revelation, should carry the burden of specifically identifying the

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Department of Justice binds the Attorney General and his agents (including the FBI director and his agents), in the same way as an injunction directed at the person of the Attorney General would bind him and his agents. Because the extent of relief to be afforded in this case does not depend on the presence of the other named defendants and because the Department is already named, this case will go forward only against the Department of Justice as the named defendant. Upon its compliance with the judgment to be entered in this case, the other defendants shall be dismissed.

[3] Mr. Patriarca has also asserted as part of his case, that FOIA exemptions 6 and 4 prohibit disclosure; and the Government has belatedly joined him in claiming exemption 6.

Mr. Patriarca asserts that disclosure would constitute a clearly unwarranted invasion of privacy under exemption 6, which exempts from disclosure medical, personnel and other files. Because the files in issue here appear to have been clearly obtained as part of a criminal investigation and maintained as part of an investigatory file, we find that exemption 6 is inapplicable. Congress clearly had exemption 7 in mind, and not exemption 6, when it legislated with regard to investigatory files.

Mr. Patriarca claims the logs, in so far as they include financial information, are covered by exemption 4. That exemption is inapplicable to the information involuntarily procured for the investigatory file involved here. The interests which that exemption protects, such as the interest in trade secrets, are not those at stake here.

sections of each document to which it objects, setting forth as to each objection the government's factual detailed reasons for doing so in light of the standards set forth in this opinion. Requiring the government to make specific objections is consistent with the statutory scheme which places the burden "on the agency to sustain its action." in withholding documents. 5 U.S.C. § 552(a)(4)(B).[4] The government must demonstrate a threat to privacy interests "more palpable than mere possibilities", *Dept. of Air Force v. Rose,* 425 U.S. 352, 380 n. 19, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976).[5]

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[4] Thus it is consistent with the statutory scheme to rely solely on the Government to make specific objections, in fulfillment of its statutory obligation to protect privacy. There is, for this reason, no need to permit Mr. Patriarca (or other persons) the opportunity to make specific objections to segregable portions of the documents. For while Mr. Patriarca had the right to intervene to make *legal* arguments on his behalf, there is no reason to doubt the capacity of the Department of Justice to make *factual* determinations herein required to apply the standards set forth in this opinion to the documents at issue. Mr. Patriarca's interest will be effectively represented by the Department in this regard.

To hold otherwise would result in a mire of practical and legal problems. There is no requirement in FOIA, even when read in light of the Privacy Act, that notice be given to all persons who might be affected by disclosure so that they might make specific objections. Indeed, to do so would be self-defeating, for requiring notice to each individual would reveal all those involved and thus would invade privacy prior to a court adjudication. Moreover, to permit Mr. Patriarca to review the documents in order to make specific objections would invade the privacy of still other persons and breach the security of documents, still confidential prior to the effectuation of a judgment ordering disclosure.

[5] *See* Cong. Rec. S19806 23 (daily ed. Nov. 21, 1974) (remarks of Sen. Thurmond), *reprinted in* 1975 Source Book at 466 (advocating a standard of "substantial possibility" for invasion of privacy which Congress implicitly rejected in overriding the presidential veto).

STANDARDS FOR DISCLOSURE

EXEMPTION 7(C): PRIOR CASE LAW

In order to protect personal privacy, FOIA and the Privacy Act together interpose a neutral magistrate between the Government's mandate to disclose and the individual's interest in his privacy. Even before the Privacy Act created a cause of action by which an individual could invoke judicial scrutiny, FOIA by itself provided, in exemptions 7(C) and 6, for the judicial balancing of privacy claims against the public interest in disclosure. As Senator Cranston noted in floor debate on the 1974 FOIA amendment, "Turning to the courts as a disinterested third party to resolve disputes . . . between individuals and the government is in keeping with centuries of American tradition."[6]

The interposing of a neutral magistrate, a model analogous to the requirement of a magistrate found in the fourth amendment's warrant clause, *see United States v. United States District Court,* 407 U.S. 297, 315-18, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), has been recognized to have wide applicability in the protection of privacy. Thus Justice Powell noted that

> the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this [private banking] information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate. *California Bankers Ass'n v. Shultz,* 416 U.S. 21, 79, 94 S.Ct. 1494, 1526, 39 L.Ed.2d 812 (1974) (Powell, J., concurring).

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[6] Cong. Rec. S19806 23 (daily ed. Nov. 21, 1974) (remarks of Sen. Cranston), *reprinted in* 1975 Source Book at 467.

While most FOIA exemptions eschew judicial balancing, exemptions 7(C) and 6 require it in order to safeguard privacy. The Supreme Court has affirmed that

> Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act . . . . *Dept. of Air Force v. Rose,* 425 U.S. at 372, 96 S.Ct. at 1604.

While *Rose* dealt with exemption 6, we shall treat 6 and 7(C) as identical in meaning because of their similarity of purpose and language, except that an unwarranted invasion of personal privacy permits withholding of investigatory files under exemption 7(C), but only a clearly unwarranted invasion of personal privacy permits withholding of personnel, medical and other files under exemption 6.

1) A developing case law has begun to give meaning to these exemptions and to strike an appropriate balance between individual privacy and public disclosure. The case law has defined the "privacy" which FOIA protects largely in terms of the content of information and has tried to demarcate those informational topics which are deeply private from those which are only minimally private.

Cases begin their search for a definition of privacy with the phrases " 'intimate details' of a 'highly personal' nature"[7] and "commonly thought of as private" matters.[8] One court has singled out "information [regarding] marital status,

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[7] *Robles v. E.P.A.,* 484 F.2d 843, 845 (4 Cir. 1973); *Getman v. N.L.R.B.,* 146 U.S.App.D.C. 209, 214, 450 F.2d 670, 675 (1971); *see* H.Rep. No. 1497, 89th Cong., 2d Sess. at 11 (1966), U.S. Code Cong. & Admin. News 1966, p. 2418, *reprinted in* 1975 Source Book at 32; S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965), *reprinted in* 1975 Source Book at 44.

[8] *Marathon LeTourneau Co., Marine Div. v. N.L.R.B.,* 414 F. Supp. 1074, 1084 (S.D.Miss. 1976).

legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, reputation . . ." as involving intimate details;[9] added to these are religious and philosophic beliefs[10] and travel history.[11] Courts have also tried to define privacy by the emotion which disclosure evokes: matters are private which, if disclosed, evoke embarrassment[12] in a person of normal sensibilities. Various cases have protected information about an individual's job performance, such as supervisors' comments or conclusions about the appropriateness of his civil service classification.[13] While corporations have no privacy,[14] per-

[9] *Ditlow v. Shultz,* 170 U.S.App.D.C. 352, 356, 517 F.2d 166, 170 (1975); *Rural Housing Alliance v. U.S. Dept. of Agriculture,* 162 U.S.App.D.C. 122, 126, 498 F.2d 73, 77 (1974). *Accord, Marathon LeTourneau Co., Marine Div. v. N.L.R.B.,* 414 F. Supp. at 1084, *Comm. on Masonic Homes v. N.L.R.B.,* 414 F. Supp. 426, 431 (E.D.Penn. 1976), *vacated,* 556 F.2d 214 (3d Cir. 1977).

[10] *Comm. on Masonic Homes v. N.L.R.B.,* 414 F. Supp. at 431 (dicta), *vacated,* 556 F.2d 214.

[11] *Mylan Pharmaceuticals, Inc. v. N.L.R.B.,* 407 F. Supp. 1124, 1126 (W.D.Penn. 1976) (dicta).

[12] *Rural Housing Alliance v. U.S. Dept. of Agriculture,* 162 U.S.App.D.C. at 126, 498 F.2d at 77; *Comm. on Masonic Homes v. N.L.R.B.,* 414 F. Supp. at 431, *vacated,* 556 F.2d 214; *Met. Life Ins. Co. v. Usery,* 426 F. Supp. 150, 168 (D.D.C. 1976).

[13] *Sears, Roebuck & Co. v. G.S.A.,* 180 U.S.App.D.C. 202, 553 F.2d 1378 (1977) *cert. denied,* 434 U.S. 826, 98 S.Ct. 74, 54 L.Ed.2d 84 (1977); *Campbell v. U.S. Civil Service Comm.,* 539 F.2d 58 (10th Cir. 1976); *Met. Life Ins. Co. v. Usery,* 426 F. Supp. 150; *Duncan v. U.S. Civil Service Comm.,* 426 F. Supp. 41 (E.D.La. 1976); *Vaughn v. Rosen,* 383 F. Supp. 1049 (D.D.C. 1974), *aff'd on other grounds,* 173 U.S.App.D.C. 187, 523 F.2d 1136 (1975); *Washington Research Project, Inc. v. H.E.W.,* 366 F. Supp. 929, 937 (D.D.C. 1973), *aff'd in part and rev'd on part on other grounds,* 164 U.S.App.D.C. 169, 504 F.2d 238 (1974), *cert. denied,* 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450 (1975). *But see Aug v. Nat'l R. R. Passenger Corp.,* 425 F. Supp. 946 (D.D.C. 1976) (disclosing salary and personnel data). *Cf. Information Acquisition Corp. v. Dept. of Justice,* 444 F. Supp. 458 (D.D.C. 1978); *Westinghouse Elec. Corp. v. Brown,* 443 F. Supp. 1225, 1233 (E.D.Va. 1977).

[14] *Robertson v. Dept. of Defense,* 402 F. Supp. 1342, 1348-49

sonal financial information is protected,[15] including information about small businesses when the individual and corporation are identical.[16] Medical information is not *per se* protected;[17] thus a court has permitted disclosure of a study indicating that persons in certain locations may have been subjected to unusual amounts of radiation.[18] While past criminal activity[19] and prison[20] records are private, disclosure may be warranted by the public interest.[21] Courts have disagreed as to whether union authorization cards are confidential.[22] Finally, the Supreme Court has said that the legislative history shows that exemption 6 refers in particular to the kind of files maintained by HEW, the Selective Service and the Veterans' Administration; such files contain " 'vast amounts of personal data' [concerning an individual] . . . showing, for example, where he was born, the names of his parents, where he has lived from time to time, his high school

(D.D.C. 1975); K. Davis, Administrative Law Treatise § 3A.22 at 163-64 (Supp. 1970). *But see Wellford v. Hardin,* 444 F.2d 21, 24 (4th Cir. 1971).

[15] *Deering Milliken, Inc. v. Irving,* 548 F.2d 1131 (4th Cir. 1977); *Luzaich v. United States,* 435 F. Supp. 31 (D.Minn. 1977); *Sonderegger v. Dept. of Interior,* 424 F. Supp. 847, 852-56 (D.Idaho 1976).

[16] *National Parks and Conservation Assoc. v. Kleppe,* 178 U.S.App.D.C. 376, 390-91, 547 F.2d 673, 687-88 (1976).

[17] *Cf. Ackerley v. Ley,* 137 U.S.App.D.C. 133, 420 F.2d 1336 (1969).

[18] *Robles v. E.P.A.,* 484 F.2d 843 (4 Cir. 1973).

[19] *Cong. News. Syndicate v. U.S. Dept. of Justice,* 438 F. Supp. 538, 544-45 (D.D.C. 1977); *Tennessean Newspaper, Inc. v. Levi,* 403 F. Supp. 1318 (M.D.Tenn. 1975).

[20] *National Prison Project of A.C.L.U. Foundation, Inc. v. Sigler,* 390 F. Supp. 789 (D.D.C. 1975).

[21] *Columbia Packing Co., Inc. v. U.S. Dept. of Agriculture,* 563 F.2d 495 (1st Cir. 1977); *Christy v. United States,* 68 F.R.D. 375 (N.D.Tex. 1975) (disclosing prior record of inmate).

[22] *See Comm. on Masonic Homes v. N.L.R.B.,* 556 F.2d 214, 218-20 & n. 5 (3d Cir. 1977).

or other school records, results of examinations, evaluations of his work performances." *Dept. of Air Force v. Rose,* 425 U.S. at 377, 96 S.Ct. at 1606.

Some courts will engage in a balancing of interests only if they first determine that a substantial invasion of privacy is threatened,[23] while others balance regardless of the seriousness of the threatened invasion.[24] These latter courts have thus had to review the privacy interests involved in the disclosure of only names and addresses[25] and marital status.[26] This has thrust upon them a more relative and contextual definition of privacy and less of a content-based definition. For example, a disclosure of only a name, ordinarily not private, in the context of Watergate could be quite embarrassing.[27] These latter courts have also come to recognize that privacy includes an interest in being free from intrusions, solicitations, mailings and harassments.[28] For example, courts have had to consider the degree to which a mere

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[23] *Rural Housing Alliance v. U.S. Dept. of Agriculture,* 162 U.S.App.D.C. at 126, 498 F.2d at 77; *Tennessean Newspaper, Inc. v. Levi,* 403 F. Supp. at 1320-21; *see Wine Hobby U.S.A., Inc. v. I.R.S.,* 502 F.2d 133, 136 (3d Cir. 1974).

[24] *Ditlow v. Shultz,* 170 U.S.App.D.C. at 356, 517 F.2d at 170; *Getman v. N.L.R.B.,* 146 U.S.App.D.C. 214, 450 F.2d at 675.

[25] *Getman v. N.L.R.B.,* 146 U.S.App.D.C. 214, 450 F.2d at 675; *Disabled Officers Assoc. v. Rumsfeld,* 428 F. Supp. 454 (D.D.C. 1977); *Mylan Pharmaceuticals v. N.L.R.B.,* 407 F. Supp. at 1126.

[26] *Met. Life Ins. Co. v. Usery,* 426 F. Supp. at 168 n. 85; *see Wine Hobby U.S.A., Inc. v. I.R.S.,* 502 F.2d at 137.

[27] *Cong. News. Syndicate v. U.S. Dept. of Justice,* 438 F. Supp. at 543 ("the context in which the information appears is determinative").

[28] *See Ditlow v. Shultz,* 170 U.S.App.D.C. 352, 517 F.2d 166 (request for names of international travelers to notify them of class action).

disclosure of a name would subject recipients to disagreeable harassment[29] or beneficial solicitations.[30]

While such courts have begun to treat privacy as a broader concept than a pure content-based definition allows, courts have only incidentally suggested that the manner in which the government obtains information determines whether it is private. No court has withheld disclosure solely on the ground that the manner in which the information was obtained forbids release. Thus, courts have disclosed information obtained on the basis of a promise of confidentiality: "While, perhaps, a promise of confidentiality is a factor to be considered, it is not enough to defeat the right of disclosure . . . ."[31] Moreover, only an explicit, not inferable, assurance of confidentiality may be recognized.[32] Other courts remain

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[29] *Wine Hobby U.S.A., Inc. v. I.R.S.,* 502 F.2d 33 (denying disclosure of names and addresses to business for commercial solicitations); *Sonderegger v. U.S. Dept. of Interior,* 424 F. Supp. 847 (D.Idaho 1976) (refusing to disclose to newspapers victims' claims for disaster relief to prevent harassment by "fast-buck artists"); *cf. Ditlow v. Shultz,* 170 U.S.App.D.C. 352, 517 F.2d 166 (one-time mail notice of class action).

[30] *Disabled Officers Assoc. v. Rumsfeld,* 428 F. Supp. 454 (nonprofit lobby for ex-officers given names of officers for a one-time membership solicitation by mail); *cf. Getman v. N.L.R.B.,* 146 U.S.App.D.C. 209, 450 F.2d 670 (names disclosed to scholar for one time solicitation for an interview).

[31] *Robles v. E.P.A.,* 484 F.2d at 846; *see Ackerly v. Ley,* 137 U.S.App.D.C. at 136-37 n. 3, 420 F.2d at 1339-40 n. 3; *Legal Aid Society of Alameda County v. Shultz,* 349 F. Supp. 771, 776 (C.D.Cal. 1972); K. Davis, Administrative Law Treatise § 3A.22 at 164 (Supp. 1970).

[32] *Poss v. N.L.R.B.,* 565 F.2d 654, 658 (10th Cir. 1977); *Philadelphia Newspapers, Inc. v. U.S. Dept. of Justice,* 405 F. Supp. 8, 12 (E.D.Pa. 1975).

unsure whether it is a factor at all.[33] One court rejected the idea that "the right to privacy includes the right to select people to whom one will communicate his ideas".[34]

2) A court, having determined that a privacy interest is at stake, must then balance it against the public interest in disclosure. Congress has already calibrated the scales strongly in favor of disclosure with respect to exemption 6 by permitting withholding only for a "clearly unwarranted invasion", and less strongly in favor of disclosure under exemption 7(C) which permits withholding to prevent an "unwarranted invasion" of personal privacy. The Supreme Court stated that the test in 7(C) is in "marked contrast" to the higher test in 6 for withholding. It noted that the Conference Committee had deleted "clearly" from the "unwarranted invasion" test of 7(C) in response to President Ford's objection. *Dept. of Air Force v. Rose,* 425 U.S. at 378 79 n. 16, 96 S.Ct. 1592.

The Supreme Court, in *Dept. of Air Force v. Rose,* made clear that it takes this calibration seriously and that courts are not to approve blanket exemptions for private matters, but rather are to balance interests carefully, giving great

[33] *Westinghouse Electric Corp. v. Schlesinger,* 542 F.2d 1190, 1196 n. 5 (4th Cir. 1976); *Ditlow v. Shultz,* 170 U.S.App.D.C. at 358, 517 F.2d at 172; *Petkas v. Staats,* 163 U.S.App.D.C. 327, 329-30, 501 F.2d 887, 889-90 (1974); *Sonderegger v. U.S. Dept. of Interior,* 424 F. Supp. at 853; *Comm. on Masonic Homes v. N.L.R.B.,* 414 F. Supp. at 432, *vacated,* 556 F.2d 214; *cf. Charles River Park "A", Inc. v. H.U.D.,* 171 U.S.App.D.C. 286, 294, 519 F.2d 935, 943 (1975); *Met. Life Ins. Co. v. Usery,* 426 F. Supp. at 172 n. 95.

[34] *Marathon LeTourneau Co., Marine Div. v. N.L.R.B.,* 414 F. Supp. at 1084; *see Cong. News. Syndicate v. U.S. Dept. of Justice,* 438 F. Supp. at 541; *Mylan Pharmaceuticals, Inc. v. N.L.R.B.,* 407 F. Supp. at 1126; *Title Guarantee Co. v. N.L.R.B.,* 407 F. Supp. 498, 505 (S.D.N.Y. 1975) *rev'd on other grounds,* 534 F.2d 484 (2d Cir.) *cert. denied,* 429 U.S. 834, 97 S.Ct. 98, 50 L.Ed.2d 99 (1976).

deference to the public's interest in disclosure. Thus in *Rose,* the Court compelled the disclosure, to student law review editors, of case summaries of honor and ethics hearings for honor code violators at the Air Force Academy. While it required personal identifying characteristics to be deleted, it ordered disclosure over the objections of dissents which stressed the possibility of identification, the life-long shame that accompanies such violations and the minimal public interest in the individual histories. Its refusal to interpret exemption 6 as giving a blanket exemption for personnel and medical files and its mandate in favor of disclosure shows that the Court intends that only serious and unwarranted intrusions on privacy may prevent disclosure.

The interest to be counterbalanced against the privacy right is the generalized interest of the public in disclosure, and not the individualized interest of the FOIA plaintiff and his particular reason for seeking the information. It is the rule of the First Circuit that the plaintiff stands in the stead of the public.[35] Thus, disclosure will not be mandated if only a private commercial interest supports it.

The public interest which has received the greatest protection is the interest in honest and efficient government. One

[35] *Columbia Packing Co., Inc. v. U.S. Dept. of Agriculture,* 563 F.2d at 498-99. *See Ditlow v. Shultz,* 170 U.S.App.D.C. at 357 n. 21, 517 F.2d at 171 n. 21; *Wellford v. Hardin,* 444 F.2d at 25; Davis, The Information Act, a Preliminary Analysis, 34 U.Chi.L.Rev. 761, 783 (1967); *see also Getman v. N.L.R.B.,* 146 U.S.App.D.C. at 215-16 and n. 24, 450 F.2d at 676-77 and n. 24 (privacy interest balanced against plaintiff's purpose in seeking disclosure); *Disabled Officers Assoc. v. Rumsfeld,* 428 F. Supp. at 457-59 (reviewing particular use to which plaintiff would put the disclosed information); *Rabbitt v. Dept. of Air Force,* 383 F. Supp. 1065, 1070 (S.D.N.Y. 1974); *Christy v. United States,* 68 F.R.D. at 378 (reviewing public benefit resulting from plaintiff's private use of information.).

court has described this as the core FOIA interest. Wherever official wrongdoing is in issue, the courts are quick to compel disclosure. In *Columbia Packing Co., Inc. v. U. S. Dept. of Agriculture,* 563 F.2d 495 (1st Cir. 1977), the First Circuit affirmed an order compelling disclosure of the employment and personnel files, including staff evaluations, of former meat and poultry inspectors who had been convicted of receiving bribes. The request was made by a meat-packing company threatened with a loss of federal inspection services (which would result in its closing) because its president had been convicted of bribing the two officials. Ignoring the private commercial purpose of the meat-packing firm, the court nonetheless justified this clear invasion of privacy because

> 'the public has an interest in whether public servants carry out their duties in an efficient and law-abiding manner' and therefore, in these circumstances, has a legitimate curiosity as to the two meat inspectors' careers. . . . [T]he scandal . . . was far-reaching and of great notoriety. To forestall similar occurrences, the public has an interest in discerning how the officials conducted themselves prior to their discharge for bribery, how well they were supervised, and whether U.S.D.A. or any of its other personnel were chargeable with any degree of culpability for their crimes. In particular, the public has an interest in knowing whether companies like Columbia were the victims of official extortion or whether the corrupt inspectors were enticed into their misconduct by the companies. *Id.* at 499.

The First Circuit suggested that where government wrongdoing is in issue there is a special interest in complete, not partial, disclosure because of the "beneficial effect upon public confidence of knowing that nothing of possible relevance is being suppressed", *id.* at 500 n. 3; complete disclosure avoids "any possible appearance of governmental 'cover-up' ". *Id.* at 501.

At issue in *Philadelphia Newspapers, Inc. v. U. S. Dept. of Justice,* 405 F. Supp. 8 (E.D. Pa. 1975), were letters from private persons to the federal parole board supporting and opposing the parole of the chairman of the Philadelphia City Commissioners who had been convicted of mail fraud. Although the letters disclosed a history of personal friendships and involvements in fraternal organizations, the court ordered disclosure, over the parole board's objection, because of the public's right to know the "basis upon which a former high public official was released from custody . . ." *Id.* at 11.

In *Congressional News Syndicate v. United States Dept. of Justice,* 438 F. Supp. 538 (D.D.C. 1977), the court reviewed files regarding the Watergate related "Townhouse operation" which collected unreported contributions for Richard Nixon's campaign. Although some contributors were entirely innocent and subject to deep embarrassment, disclosure of all contributors was ordered because the material "entailed what later was determined to be criminal conduct on the part of holders of the public trust". *Id.* at 544. The court noted that the federal reporting law had stripped away the privacy interest of these private persons in their contributions. On the other hand, the court refused to order disclosure of the lengthy criminal record of the landlord of the premises in which the Townhouse operation was located. The court concluded that, even if he were involved with the illegal operation, his past crimes were so unrelated to the present wrongdoing that his privacy interest outweighed the public's interest. The court emphasized that disclosure of his past record coupled with an innuendo of present wrongdoing, in the absence of current criminal charges, would deprive him of a forum to clear his name.

Finally, the disclosure in *Dept. of Air Force v. Rose* related to the non-criminal wrongdoing of cadets in whom the public had placed its trust. 425 U.S. at 383, 96 S.Ct. 1592 (Burger, C. J., dissenting).

The public interest in disclosure, of course, extends beyond the interest in the honesty of those who occupy the public trust and beyond the normal workings of the government. For example, it includes personnel information regarding persons paid by public funds. *See Aug v. National Railroad Passenger Corp.*, 425 F. Supp. 946 (D.D.C. 1976) (disclosing salary and personnel decisions by Amtrak Board of Directors).

The special interest in non-governmental public figures also justifies disclosure of information under FOIA. The doctrine of "public personage", which limits the common law right of privacy, has been applied to FOIA actions as well. In *Tennessean Newspapers Inc. v. Levi,* 403 F. Supp. 1318 (M.D.Tenn. 1975), the court required a United States attorney to disclose information concerning arrested persons, including names, addresses, and marital and employment status, because "individuals who are arrested or indicted become persons in whom the public has a legitimate interest .... The lives of these individuals are no longer truly private". *Id.* at 1321; *see Congressional News Syndicate v. U.S. Dept. of Justice,* 438 F. Supp. at 544.

A different factor to be weighed in the decision to disclose is the likelihood that the plaintiff will use the information in a way which benefits the public. Thus courts have disclosed information useful to scholars studying governmental policy because they would put the information into a form useful to the public. In *Deering Milliken Inc. v. Irving,* 548 F.2d 1131 (4th Cir. 1977), a court justified disclosure of workers' private financial records to a corporation in a suit for back-pay, because the entire labor controversy, of which this was a small part, had been studied intensively by law professors and was the subject of many law review articles. Similar reasoning justified disclosure of the names of workers, voting in an N.L.R.B. election, to scholars who wished to interview them in a study of election techniques. The court noted the

great need for such empirical studies and stressed that the proposed study was of exceptional academic quality. *Getman v. N. L. R. B.,* 146 U.S.App.D.C. 209, 214, 16, 450 F.2d 670, 675, 77 (1971).

To the contrary, where a misuse of information may result, courts are wary of ordering disclosure. Thus one court in disclosing union authorization cards first found the danger of their being used in an unfair labor practice to be minimal.[36] Another court refused to order disclosure of the amount of individual claims submitted by survivors of a dam disaster, lest the information cause dissention and ill-feeling in an already fragile community and put the victims at a disadvantage in bargaining with contractors to rebuild their homes.[37]

Finally, there are two general principles to be considered in mandating disclosure. Where there is no alternative source of information, courts favor disclosure.[38] In addition, a court always should prefer the deletion of identifying material to blanket withholding, in order to maximize the amount of disclosure ordered.[39]

LEGAL CONCLUSIONS

The Present Case

The Court engaged in a partial *in camera* review of the logs in issue and found that none fell within any of the categories which, according to decisional law, should be excluded from

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[36] *Comm. on Masonic Homes v. N.L.R.B.,* 414 F. Supp. at 431, *vacated,* 556 F.2d 214.

[37] *Sonderegger v. U.S. Dept. of Interior,* 424 F. Supp. at 852-56.

[38] *Getman v. N.L.R.B.,* 146 U.S.App.D.C. at 216, 450 F.2d at 677; *Disabled Officers Assoc. v. Rumsfeld,* 428 F. Supp. at 458-59; *Christy v. United States,* 68 F.R.D. at 378.

[39] *Dept. of Air Force v. Rose,* 425 U.S. at 374, 381-82, 96 S.Ct. 1592.

public scrutiny. Though I surmise that the remaining logs will be of the same tenor as those I have read,[40] I will, nevertheless, set forth three categories and the law pertaining to each which will be used as a guide in ruling on any objections that might be made by the government:

1) Matters relating to Mr. Patriarca's private life, and the private lives of his family members who are still living, *i.e.* his health, as well as that of his family, personal and religious beliefs and the like.

2) Dealings with public officials and public figures in matters which may be legal and/or illegal.

3) The names and code names or numbers of FBI agents and informants.

Matters Relating to Mr. Patriarca's Private Life

The first type of information, matters relating to family relationships and personal friendships, is private. The conversations no doubt also express each speaker's character in repose, relaxation and spontaneity. These aspects of character are also private: to whom a person wishes to show himself is within his own control.

The only interest the public has in such information, as far

[40] We may briefly dispose of two specific objections already raised by the Government in its motion for summary judgment. It claims that unintelligible portions of the files ought not be disclosed because no public interest could thereby be served. This must fail because the Government has the burden of showing that disclosure ought not to occur, *supra* at 783, but it cannot show that any privacy interest or any exemption is implicated by unintelligible portions of the logs. *See National Prison Project of the ACLU v. Sigler,* 390 F. Supp. 789, 794 (D.D.C. 1975). The Government also claims that portions in which a person is identified by first name only ought to be withheld lest curiosity about his actual identity lead to harmful speculation. This too must fail because no particularized and imminent threat to an individual's privacy has been shown which would satisfy the Government's burden.

as this Court can foresee, derives from its curiosity about a man of such notoriety as Mr. Patriarca. The only purpose of disclosure would be to satisfy an idle curiosity. Mr. Patriarca is not such a public figure as to warrant the conclusion that every aspect of his life is fit for public consumption. Even a President, as to whom the public has the most compelling, near total interest, has private realms which may not be disclosed.[41]

Dealings with Public Figures

The Court strikes a different balance with regard to information concerning Mr. Patriarca's possible dealings with prominent persons, public officials and persons involved with organized crime. Favoring disclosure is the general Congressional mandate in FOIA to disclose. Moreover, the Congressional conferees for the 1974 FOIA amendments specifically approved the policy of the Justice Department regarding disclosure of investigatory records of historic interest and over 15 years old. In this case, the first year of surveillance is more than 15 years past.

Also favoring disclosure is the plaintiff's intention to further develop the information through investigative reporting and to give its findings broad dissemination to the public. The House Report on the 1974 amendments specifically noted "the relative lack of utilization of the act by the news media".[42] Here a newspaper has tried to use FOIA, and disclosure to it would protect one of the basic purposes of the statute, to further the public's first amendment right to know. At stake is the opportunity for a newspaper to inform

[41] *Nixon v. Administrator of General Services,* 433 U.S. 425, 455-65, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977); *cf. Time, Inc. v. Firestone,* 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976) (prominent divorcee not a public figure).

[42] *See* H.R.Rep. No. 92-1419, 92 Cong., 2d Sess., *reprinted in* 1975 Source Book at 15.

the citizens of Rhode Island about the alleged widespread corruption of public officials by organized crime and the response of state and federal law enforcement officials to this corruption. *See Columbia Packing Co., Inc. v. U. S. Dept. of Agriculture, supra.* In fact, during the administrative appeal regarding this FOIA request, Deputy Attorney General Flaherty, in his letter of October 2, 1977 to plaintiff's counsel, described the "public interest in the release of these materials" as "substantial". Finally, no other source is available for this information.

Also favoring disclosure are the diminished privacy interests of Mr. Patriarca and the public officials and public persons with whom he allegedly associated. Public officials[43] have made a willing choice to enter the public fray and are held to have accepted the consequences. The same is true of the public figure who voluntarily[44] or involuntarily[45] enters

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[43] *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (defamation); *Garrison v. Louisiana,* 379 U.S. 64, 77, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) (defamation). *Rosenblatt v. Baer,* 383 U.S. 75, 85, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966) (defamation) (candidate for office); *Nixon v. Administrator of General Services,* 433 U.S. at 457, 65, 97 S.Ct. 2777 (diminished privacy interest of former public official).

[44] *Cf. Curtis Publishing Co. v. Butts,* 388 U.S. 130, 162-68, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (Warren, C. J., concurring); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 345, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974) (defamation) (public figures who have "voluntarily injected themselves into a public controversy"); *Time, Inc. v. Firestone,* 424 U.S. 448, 484-89, 96 S.Ct. 958, 47 L.Ed.2d 154 (Marshall, J., dissenting); *Ryder v. Time, Inc.,* 181 U.S.App.D.C. 201, 203, 557 F.2d 824, 826 (1976); *Sidis v. F-R Pub. Corp.,* 113 F.2d 806 (2d Cir.), *cert. denied,* 311 U.S. 711, 61 S.Ct. 393, 85 L.Ed.2d 462 (1940); *Fram v. Yellow Cab Co.,* 380 F. Supp. 1314, 1333-34 (W.D.Pa. 1974); *Hoffman v. Washington Post Co.,* 433 F. Supp. 600, 604 (D.D.C. 1977). *But cf. Zacchini v. Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 573-78, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) ("right of publicity").

[45] *Cf. Cantrell v. Forest City Pub. Co.,* 419 U.S. 245, 95 S.Ct. 465,

the public arena. Thus the public figure, including the businessman[46] who voluntarily assumes the helm of an important enterprise, gives up some of his interests in privacy.

Moreover, it has been held that involvement with crime makes one a public figure with regard to the criminal activity.[47] Even personal information, as it relates to criminal acts, is of public interest. The criminal has voluntarily assumed the status of a public figure: even the victim,[48] though un-

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42 L.Ed.2d 419 (1974) (false light privacy); *Meeropol v. Nizer,* 381 F. Supp. 29, 32, 35 (S.D.N.Y. 1974) *aff'd* 560 F.2d 1061 (2d Cir. 1977) (children of public figures). *But cf. Time, Inc. v. Firestone,* 424 U.S. at 452, 54, 96 S.Ct. 958 (necessary resort to divorce courts does not make one a public figure).

[46] *Cepeda v. Cowles Mag. and Broadcasting, Inc.,* 392 F.2d 417 (9th Cir.) *cert. denied,* 393 U.S. 840, 89 S.Ct. 117, 21 L.Ed.2d 110 (1968); *Trans World Accounts, Inc. v. Assoc. Press,* 425 F. Supp. 814, 818, 21 (N.D.Cal. 1977) (corporation); *Martin Marietta Corp. v. Evening Star Newspaper,* 417 F. Supp. 947, 954-57 (D.D.C. 1976) (defamation) (defense contractor). *But cf. Lawlor v. Gallagher Presidents' Report, Inc.,* 394 F. Supp. 721, 731 (S.D.N.Y. 1975) (executive of large corporation not public figure for defamation suit), *remanded,* 538 F.2d 311 (2d Cir. 1976).

[47] *Cf. Monitor Patriot Co. v. Roy,* 401 U.S. 265, 277, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971) (defamation); *Ocala Star-Banner Co. v. Damron,* 401 U.S. 295, 91 S.Ct. 628, 28 L.Ed.2d 57 (1971) (same); *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971) (same); *McNally v. Pulitzer Pub. Co.,* 532 F.2d 69, 77-79 (8th Cir. 1976), *cert. denied,* 429 U.S. 855, 97 S.Ct. 150, 50 L.Ed.2d 131 (1976) (privacy); *Cardillo v. Doubleday Co.,* 518 F.2d 638 (2d Cir. 1975); *Rosenberg v. Martin,* 478 F.2d 520, 524 (2d Cir. 1973), *cert. denied,* 414 U.S. 872, 94 S.Ct. 102, 38 L.Ed.2d 90 (1973) (privacy); *Bergman v. Stein,* 404 F. Supp. 287, 296-97 (S.D.N.Y. 1975) (defamation and privacy); *Travers v. Paton,* 261 F. Supp. 110 (D.Conn. 1966); *Mattheis v. Hoyt,* 136 F. Supp. 119 (W.D.Mich. 1955); *Raynor v. American Broadcasting Co.,* 222 F. Supp. 795, 796-97 (E.D.Pa. 1963).

[48] *Cf. Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) (privacy); *Time, Inc. v. Hill,* 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) (false light privacy).

willing, loses some of his right to privacy. Also, involvement with known criminals[49] may diminish one's privacy right, as does association with public officials.[50] The same is true of those entwined in matters of public consequence.[51] Thus, with regard to legal and allegedly illegal acts, public officials and public figures have less than a substantial interest in privacy.[52] Mr. Patriarca is such a public figure. For decades he has been a figure of great notoriety, public speculation and the object of criminal prosecutions. The activities portrayed in the logs which I have read may be interpreted as revealing a conspiratorial hierarchy of crime: such activity is a legitimate subject of public interest and should be disclosed. The public certainly has an interest in knowing the full extent of any illegal operation, with all its levels of authority. No matter how low one is in a hierarchical structure and no matter how unknown his name may be, he is, nevertheless, an integral part of the entire scheme, and thus has made himself a figure of great public interest. There may be a case of individual, isolated wrongdoing where it may be argued FOIA

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[49] *Cf. Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443-45 (S.D.Ga. 1976) (past publicity about repeated contact with underworld figures makes one a public figure).

[50] *Cf. Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 62, 91 S.Ct. 1811 (White, J., concurring). *But cf. Time, Inc. v. Firestone*, 424 U.S. at 476-77, 96 S.Ct. 958 (Brennan, J., dissenting) (questioning continued validity of Justice White's concurrence in *Rosenbloom*).

[51] *Cf. Wolston v. Readers Digest Ass'n, Inc.*, 429 F. Supp. 167, 174-78 (D.D.C. 1977) ("a virtual nonentity desiring no attention at all may, by engaging in activity that appears to affect the public's well-being, qualify" as a public figure).

[52] Plaintiff is wrong in arguing that because Rhode Island does not recognize a tort for privacy, *see Gravina v. Brunswick*, 338 F. Supp. 1, 3 (D.R.I. 1972), these persons have no privacy interest at all. FOIA protects privacy as a matter of federal law. Although federal courts look to the common law for guidance in defining privacy, the right protected in FOIA proceedings is a federal one.

does not mandate the revelation of such act because the public interest in disclosure does not outweigh the individual's interest that his government not brand him as guilty without the proper invocation of the criminal process. However, this is not the situation here, where each individual is an integral part of the entire scheme. The public interest supports disclosure, and we must keep in mind that the Providence Journal is especially suited to serve this public interest.

With respect to public officials, since they have deliberately exposed their conduct to public scrutiny and hold the public trust, and because their dealings with Mr. Patriarca are *per se* of public interest, all their dealings with Mr. Patriarca, both legitimate and illegitimate, will be subject to disclosure.

Names of F.B.I. Agents and Informants

The government asserts that the names of FBI agents and informants should be withheld pursuant to 7(C). One court has flatly rejected the proposition that governmental employees, such as FBI agents, have any valid expectation that the fact of their employment is private, except where Congress has explicitly provided otherwise.

> As employees of a public agency, they have no legitimate privacy right to the deletion of their names. Their involvement in investigative activities for the FBI is not a 'private fact'. *Ferguson v. Kelley*, 448 F. Supp. 919, 923 (N.D.Ill. 1977).

That court recognized, however, that agents' names might be withheld under other exemptions, such as (b)(7)(F) and (b)(5).

Other courts have found that agents possess at least a minimal privacy interest in their employment. The Fourth Circuit has said

> One who serves his state or nation as a career public ser-

vant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives. While the right of privacy to these FBI agents is perhaps minimal, we find that the public interest in the identification of the FBI agents . . . to be even less. *Nix v. United States,* 572 F.2d 998, 1006 (4th Cir. 1978) (footnote omitted); *accord, Tarnopol v. FBI,* 442 F. Supp. 5, 8 (D.D.C. 1977) (withholding agents' names to prevent possible harassment); *Johnson v. Dept. of Justice,* C.A. No. 77-2276, slip op. at 2-3 (E.D.La. April 25, 1978); *cf. Maroscia v. Levi,* 569 F.2d 1000, 1002 (7th Cir. 1977) (relying on (b)(7) to withhold agents' names).

Originally the Department of Justice asserted exemption (b)(7)(F), which exempts from disclosure information which would "endanger the life or physical safety of law enforcement personnel", on behalf of its agents. However, the deputy attorney general withdrew this claim in the administrative appeal of this case, claiming that the agents' names were outside the scope of the request which sought only the transcripts of conversations. Yet here agents' names may appear as part of the same documents which contain the transcripts or summaries of transcripts. The Department of Justice's reading is too narrow; the request includes agents' and informants' names. A FOIA request should not require the specificity and cunning of a carefully drawn set of discovery requests, so as to outwit narrowing legalistic interpretations by the government. A citizen should be able to submit a brief and simple request for the government to make full disclosure or openly assert its reasons for non-disclosure. Because a sufficient factual case for the applicability of

(b)(7)(F) has been made out on the basis of two affidavits by Special Agent Lang, the Court permits the withholding of agents' names and code names, subject to the plaintiff's right to move for revelation in those cases where the names of the agents may be directly relevant to an understanding of the nature and extent of the surveillance and thus fall within the statute's central mandate favoring disclosure. Although the plaintiff makes a cogent argument that the government is foreclosed from raising exemptions not raised and sustained at the administrative level, the Court applies the exemption as stated herein because it is applicable and because to permit further administrative determinations would be of no use to anyone.

With regard to informants' names and code numbers, their privacy interest outweighs the public interest in disclosure. However, as in the case of agents, the Court will entertain motions by the plaintiff to reveal the names of informants where it is directly relevant to an understanding of the nature and extent of the surveillance.

Finally, as to persons now deceased, there is no protectable privacy interest.[53]

The Reliability of the Conversations

Special F.B.I. Agent Patrick Lang, in his affidavit of May 23, 1978, asserted that:

> 1) The conversations 'reveal participation in or knowledge of various activities on the part of the participants to the conversations. This knowledge . . . is not otherwise supported. If released, persons may retaliate against the participants. . . .'

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[53] *See* Restatement, Second, Torts, § 6521 (1977) (common law privacy action is a personal right of living person); *cf. id.* § 560 (defamation of deceased persons).

2) Third parties, including prominent persons, were discussed without their knowledge. 'This information would be released without actual proof or supporting material concerning such activity, and if untrue could destroy the legitimate careers or reputations of these officials.'

3) Participants and those mentioned in the conversations were often identified by first or last names, set forth phonetically or by voice or 'tentative voice identification'. Mistakes by agents or similarities of names could lead to innocent persons being hurt.

With regard to paragraph one, the Court finds little reason to doubt the veracity of the statements made by the participants to each other. With regard to the second and third paragraphs, however, the Court is concerned about the accuracy of information regarding third persons not parties to the conversations.[54]

The Court in *Cerveny v. CIA*, 445 F. Supp. 772, 776 (D.D.C. 1978) evinced a similar concern when it refused to order disclosure of a CIA file containing "unsubstantiated information which is derogatory and which concerns persons not connected" with the subject of the request. *Id.*

A moment's reflection upon recent political history and the excesses of the internal security investigations in the 1950's should be sufficient to signal caution in dealing with the unverified derogatory material within the files of an intelligence gathering agency of government. Indiscriminate public disclosure of such material in response to a citizen's FOIA request would be as much an abuse of agency authority as an intentional release designed to damage persons. *Id.*

Compare, Schwartz v. Department of Justice, C.A. No. 76-2039, *slip op.* at 4 (D.D.C. Feb. 9, 1978) (refusing to disclose "unverified opinions" to plaintiff whose motives the court doubted).

The troubling question in reaching a (b)(7)(C) balance is whether the alleged unreliability diminishes the public interest in disclosure and concomitantly heightens those privacy interests, usually protected by the torts of defamation and false light privacy. *See* Restatement, Second, Torts, §§ 558 *et seq.*, 652E (1977).

Sua sponte, this Court raised the question whether it should order disclosure of statements in the nature of "hearsay" that are contained in the records covered by plaintiff's FOIA request in either of two situations, where said statements

a) concern the operations of an organization engaged in criminal activities; or

b) concern supposed activities by a reputable public figure which are either

1) criminal in themselves or
2) involve associations with criminal figures or
3) concern supposed activities by a reputable public official that are designed to obtain favoritism for a particular private interest.

The Court's main concern was whether the diminished

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[54] Courts have evinced concern for the privacy of third persons mentioned in investigatory records. *See, e.g., Maroscia v. Levi,* 569 F.2d 1000, 1002 (7th Cir. 1977); *Ferguson v. Kelley,* 488 F. Supp. 919, 922-26 (N.D.Ill. 1977); *Tarnopol v. FBI,* 442 F. Supp. 5, 8 (D.D.C. 1977); *Cerveny v. CIA,* 445 F. Supp. 772 (D.D.C. 1978); *St. Louis Post-Dispatch v. FBI,* 447 F. Supp. 31, 38 (D.D.C. 1977). *See also* 120 Cong. Rec. S-9330 (daily ed. May 30, 1974) (remarks of Sen. Hart) ((b)(7)(C) "intended to protect the privacy of any person mentioned in the requested files and not only the person who is the object of investigation") *reprinted in* 1975 Source Book at 333.

Here those third persons are central to the purpose of the FOIA request, and this Court has concluded, *supra,* that there is a significant public interest which favors disclosure of matters concerning them. Also, none of them had any expectation, reasonable or unreasonable, in the privacy of these conversations; thus no fourth amendment interest can come into play as to them.

reliability of hearsay statements lessened the public interest in disclosure when balanced against the privacy interest of the subjects of the conversations. It must be concluded on the basis of FOIA itself that there is no diminished standard of disclosure, and that under the balancing test of exemption 7(C) "hearsay" is irrelevant to the privacy interest at stake.

To begin with, the restrictive language of the act is manifest in § 552(c) which "does not authorize withholding of information or limit the availability of records to the public except as specifically stated" therein. As plaintiff's counsel points out, "[t]he Senate Judiciary Committee explanation of the FOIA underscores the exclusiveness of the statutory exemptions:

> 'It is the purpose of the present bill to eliminate [the vague phrases of the predecessor statute], to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld.'

S.Rep. No. 813, 89th Cong., 2d Sess. 4 (1966), reprinted in *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles* at 38 (Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary)" (Plaintiff's Memorandum, Aug. 21, 1978).[55]

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[55] In oral argument Mr. William M. Kunstler, on behalf of the intervenor, contended that this Court could exercise its discretion, pursuant to its inherent equitable power, to refuse to order the release of the documents in question. As reasons for this position his postulate is the illegality of the method used by the Federal Bureau of Investigation, an agency, as he described it, proven to have engaged in a national pattern of criminal acts; and the Bureau's relation with the press in what might be termed, as the Court understood the argument, a conspiratorial rapport to have whatever information it wished publicized whether or not such information was false, and/or legally or illegally obtained. He concluded that a ruling allowing the release of such information causes illegality to achieve a value where the Bureau and the press can "pillory" every human being with the imprimatur of the United States District Court. Such a situation, he urged, exists in this case and creates exceptional circumstances warranting this Court to go beyond the statute and decline disclosure. As authority he cites *Caplan v. Bureau of Alcohol, Tobacco & Firearms,* 445 F. Supp. 699 (S.D.N.Y. 1978) (A manual concerning raid and search tactics withheld, although not within the express language of a specific statutory exemption, because disclosure would impair the agency's law enforcement ability).

With all respect I cannot agree with the *Caplan* court. As plaintiff's counsel points out there are a number of cases holding that "equitable discretion" is non-existent or at least very narrowly circumscribed. *Halperin v. Dept. of State,* 184 U.S.App.D.C. 124, 131, 565 F.2d 699, 706 (1977); *Tax Analysts and Advocates v. IRS,* 164 U.S.App.D.C. 243, 248, 505 F.2d 350, 355 (1974); *Robles v. EPA,* 484 F.2d 843, 847 (4th Cir. 1973); *Hawkes v. IRS,* 467 F.2d 787, 792 n. 6 (6th Cir. 1972); *Getman v. N.L.R.B.,* 146 U.S.App.D.C. 209, 217, 450 F.2d 670, 678 (1971); *Soucie v. David,* 145 U.S.App.D.C. 144, 153-54, 448 F.2d 1067, 1076-77 (1971); *Save the Dolphins v. U.S. Dept. of Commerce,* 404 F. Supp. 407, 413 (N.D.Cal. 1975). The rejection of the "equitable discretion" argument is enforced by the Supreme Court's decision in *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) (so-called "snail darter" case). There the Court refused to pre-empt congressional action by a judicial decree which accords with "common sense and the public weal". The Chief Justice wrote:

> "Here we are urged to view the Endangered Species Act 'reasonably,' and hence shape a remedy that accords with some modicum of commonsense and the public weal. But is that our function? We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam. Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities,

It seems clear the FOIA is intended to afford broad access to government records and requires that all government materials be made available unless "explicitly allowed to be

kept secret" by one of the enumerated exemptions. 5 U.S.C. § 552(b). Decisional interpretations of the exemptions have been narrow, developing the rule that "disclosure, not secrecy, is the dominant objective of the Act". *Department of the Air Force v. Rose,* 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976). In short, out legislators, certainly aware of the hearsay aspect of many of the investigatory reports and the like, chose not to provide protection from revelation of this kind of information unless to do so would constitute an unwarranted invasion of privacy. Although publication of untrue statements may give rise to a defamation claim, and however distasteful it may be to leave this sole remedy to the person defamed, it cannot be said that defamation and privacy invasion are one and the same thing. *See Time v. Hill,* 385 U.S. 374, 384 n. 9, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967); *Meeropol v. Nizer,* 381 F. Supp. 29, 36 n. 6 (S.D.N.Y. 1974) *reversed on other grounds,* 560 F.2d 1061 (2d Cir. 1977); *Gruschus v. Curtis Publishing Company,* 342 F.2d 775, 776 (10th Cir. 1965); *Afro-American Publishing Co. v. Jaffe,* 125 U.S.App.D.C. 70, 366 F.2d 649 (1966). The Court is concerned about the potential misuse of "hearsay"; however, the Congress intended that all records be open to public scrutiny regardless of its reliability or accuracy. The only recourse for irresponsible publication is a damage action.

Consequently, the language, legislative history, and dominant purpose of the Freedom of Information Act indicate that the public's right to know about criminal activity and the government's reaction to it is virtually unqualified under the Act.

All motions pending in this case are hereby resolved pursuant to this opinion and have been ruled upon accordingly.

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thereby adopting a policy which it described as institutionalized caution.

Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end." *Id.* 98 S.Ct. 2301-02.

Furthermore, *Caplan* involved exemptions 2 and 7(E) which sections do not require a balance of competing policies.

Appendix C.

PROVIDENCE JOURNAL CO., Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION et al., Defendants, and Raymond L. S. Patriarca, Intervenor.

Civ. A. No. 77-0526.

United States District Court,
D. Rhode Island.

May 15, 1978.

Matthew F. Medeiros, of Edwards & Angell, Providence, R.I., for plaintiff.

Vincent M. Garvey, Civ. Div., U.S. Dept. of Justice, Washington, D.C., Everett C. Sammartino, Asst. U.S. Atty., R.I., Providence, R.I., Harris L. Berson, Providence, R.I., Harvey Brower, Lawrence, Mass. for defendants.

OPINION

PETTINE, Chief Judge.

This case counterposes rights of privacy, under the Freedom of Information Act[1] and guaranteed by the Constitution, against the right of a newspaper, which asserts the public's interest, to compel disclosure of governmental files concerning a public figure. At issue are FBI logs derived from an illegal electronic surveillance.

Between March 1962 and July 1965, the FBI tape recorded conversations via an electronic listening device or "bug" implanted without a warrant at the National Cigarette Service, 168 Atwells Ave., Providence, Rhode Island, the place of business of Raymond L. S. Patriarca. Agents then compiled logs and memoranda from those tapes before erasing them. A history of this surveillance may be found in *United States v. Taglianetti*, 274 F. Supp. 220 (D.R.I. 1967), *aff'd* 398 F.2d 558 (1st Cir.), *aff'd per curiam* 394 U.S. 316, 89 S.Ct. 1099, 22 L.Ed.2d 303 (1969), a case involving the prosecution of one of Mr. Patriarca's business associates for tax evasion. At that time the Providence Journal, the leading newspaper in Rhode Island, published the transcripts of the surveillance which had been disclosed in court.

The Providence Journal now seeks complete disclosure of all logs and memoranda derived from the three years of surveillance in the belief that the logs contain information about organized crime in New England and its relationship with various Rhode Island public officials and business and financial leaders.

The Providence Journal submitted a request to the FBI for these documents pursuant to the Freedom of Information Act (FOIA) on November 1, 1976. It indicated that it intended to publish the documents and to use them as the basis for investigative reporting; and it deemed that disclosure was in the public interest and might promote effective and vigorous law enforcement.

Clarence Kelley, Director of the FBI, formally refused, on June 10, 1977, to disclose the material based on the investigatory file exemption[2] of FOIA. Disclosure, he asserted,

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[1] 5 U.S.C. § 552 (1976).

[2] Exempt from the disclosure requirements of 5 U.S.C. § 552(a) are:

> Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy,

would wrongly interfere with enforcement proceedings, constitute an unwarranted invasion of privacy and divulge a confidential source, 5 U.S.C. §§ 552(b)(7)(A), (C), (D). The newspaper appealed to the Attorney General. When no answer was forthcoming within the statutory period, the Providence Journal filed this suit to compel disclosure, pursuant to 5 U.S.C. § 552(a)(4)(B). Subsequently, the Deputy Attorney General affirmed Director Kelley's refusal to disclose, but only on the basis that disclosure of these "investigatory files compiled for law-enforcement purposes" would "constitute an unwarranted invasion of privacy". Therefore, only that one claim of exemption, 5 U.S.C. § 552(b)(7)(C), is presented to this Court by the Department of Justice.

To protect his privacy interests in the logs and memoranda, Raymond Patriarca moved to intervene in this litigation. In response to Mr. Patriarca's motion of October 7, 1977, for a temporary restraining order to halt any voluntary disclosure by the Department of Justice, this Court ordered the defendant to give notice prior to any proposed release of documents.

On September 7, 1977 at a pre-trial conference called by the Court and attended by counsel, the Court raised *sua sponte* a number of preliminary legal issues which it felt had to be briefed in order to resolve the complex legal questions presented by this litigation. These issues, as set forth in the Court's Order of September 13, 1977, are as follows:

1. Whether the Freedom of Information Act (5 U.S.C. §

(D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

5 U.S.C. § 552(b)(7).

552) and the Privacy Act (5 U.S.C. § 552a), when read in light of the Fourth Amendment, require an agency to disclose information which was obtained in violation of that Amendment.

2. Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510 *et seq.*) or prior federal legislation would prevent disclosure of transcripts of conversations obtained through illegal means.

3. Whether the foregoing statute or prior such statutes are included within exemption (b)(3) of the Freedom of Information Act and thus specifically exempt from required disclosure.

4. Whether the public's right to know and the right of the press to publish information of public interest prevails over claims that the information was obtained in violation of the proposed intervenor's rights.

5. Whether Mr. Raymond L. S. Patriarca has a right to intervene in this action and, if so, whether he has standing to raise the above issues.

It is these issues the Court will now resolve.

MOTION TO INTERVENE

Preliminary Question No. 5, *supra*

Raymond Patriarca seeks to intervene in this suit under Fed.R.Civ.P. 24(a). To do so he must claim an interest relating to the property or transaction which is the subject of the action and be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless his interest is adequately represented by existing parties.

Mr. Patriarca undoubtedly presents a colorable claim of interest in preserving the privacy of the logs and memoranda which are the subject of this action. Their disclosure would as

a practical matter impede, in fact, destroy his ability to protect that interest. This much the plaintiff Providence Journal concedes, as it must. It also admits that the right of intervention in FOIA actions is clearly established.[3]

The plaintiff contends, however, that the United States adequately represents Mr. Patriarca's interest in his privacy. Rule 24(a) would not then permit intervention. Plaintiff points to the penalties which may be imposed under FOIA "for arbitrary and capricious withholding of documents,"[4] and assures Mr. Patriarca that these penalties will cause the Department to put on a vigorous defense of its decision to withhold.

However, all that Mr. Patriarca must show under Rule 24(a) is that his interest may not be adequately represented; no showing of actual inadequacy is required.[5] Mr. Patriarca's reluctance to rely on the Department of Justice to protect his privacy is understandable. Having been the subject of continuous electronic surveillance by the FBI for three years and the object of a successful U.S. prosecution for, among other charges, the use of the telephone in interstate commerce with the intent to commit murder and to further an unlawful gambling enterpise, *Patriarca v. United States,* 402 F.2d 314 (1st Cir. 1968), *cert. denied,* 393 U.S. 1022, 89 S.Ct. 633, 21 L.Ed.2d 567 (1969), Mr. Patriarca need not now rely on any supposed identity of interest between himself and the Government in keeping the fruits of its electronic surveillance confidential.

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[3] *Cf. Chamber of Commerce of the United States v. Legal Aid Society,* 423 U.S. 1309, 96 S.Ct. 5, 46 L.Ed.2d 14 (1975) (Douglas, J. in Chambers); *Sears, Roebuck & Co. v. G.S.A.,* 180 U.S.App.D.C. 202, 553 F.2d 1378 (1977), *cert. denied,* 434 U.S. 826, 98 S.Ct. 74, 54 L.Ed.2d 84 (1977); *Committee on Masonic Homes v. N.L.R.B.,* 556 F.2d 214 (3d Cir. 1977).

[4] *See* 5 U.S.C. §§ 552(a)(4)(E), (F).

[5] *Sam Fox Publishing Co. v. United States,* 366 U.S. 683, 691, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961).

The plaintiff claims that Patriarca's assertion of the FOIA exemption[6] for personnel and medical files is not sufficiently different from the Government's assertion of exemption 7 for investigatory files to establish his claim of inadequacy of representation. But no such difference in asserted defenses and claims need be shown by the intervenor. Mr. Patriarca has a particular, unique interest with regard to the logs and memoranda which differs from the more general interest which the Government has in protecting privacy and fulfilling its obligations under FOIA. The personal nature of the privacy interest makes intervention especially appropriate; denial of intervention with the resulting dependence on the Government is especially onerous. No one can better assert an interest in personal privacy than the person whose privacy is at stake.

Courts have not compelled private persons seeking intervention in other cases to depend on the Government's representation of the public interest, when the intervenor asserts some specialized interest justifying intervention.[7] If private parties need not rely on the Government's vigorous assertion of the public interest but are granted their day in court, then surely Mr. Patriarca may have his say when the Government is asserting only his personal interest in privacy. The reasons, such as having a unified and coherent expression of the public interest, which might lead a court to rely ex-

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[6] 5 U.S.C. § 552(b)(6) exempts from the applicability of the disclosure requirements of § 552(a): "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

[7] *See, e.g., Trbovich v. United Mine Workers of America,* 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972); *Cascade Natural Gas Corp. v. El Paso Natural Gas,* 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967); *United States v. Reserve Mining Co.,* 56 F.R.D. 408, 416-20 (D.C.Minn. 1972); Wright & Miller, Federal Practice and Procedure, Civil § 1909 at 522-33 (1972).

clusively on the Government's advocacy of the public interest are absent in such a case as this.

However, plaintiff argues that even if Mr. Patriarca has standing under Fed.R.Civ.P. 24(a), he lacks standing to intervene because this Court cannot grant him relief. Plaintiff argues that the grant of relief would turn this into a "reverse FOIA" action which it considers to "be inconsistent with the basic purpose of the FOIA, which was not to afford confidentiality, but to overcome restrictive agency interpretations of the original public information section . . ." *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172, 1185 (3d Cir. 1977), *cert. granted*, 435 U.S. 914, 98 S.Ct. 1466, 55 L.Ed.2d 504 (1978).

Regardless of whether a reverse-FOIA action lies, Mr. Patriarca has a colorable claim arising directly under the fourth amendment for injunctive relief to protect his right to be free of unreasonable searches and seizures and governmental improprieties with regard to those seizures. He may assert that claim as intervenor in this suit.

With regard to the reverse-FOIA suit, the First Circuit has recognized that review of an agency determination to disclose may be had pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 702-06 (1976), in light of standards derived from common law, statute, regulation or the Constitution. But it has not determined whether a reverse-FOIA suit will lie. *Usery v. Whitin Machine Works, Inc.*, 554 F.2d 498, 503-04 n.4 (1st Cir. 1977).

We need not decide this question, for Mr. Patriarca has a claim under the Privacy Act of 1974, 5 U.S.C. § 552a (1976), which grants plaintiff standing to sue, § 552a(g)(1)(D), for the wrongful disclosure of records pertaining to him where the Government has not first obtained his permission as required by § 552a(b).[8] Here no permission to disclose his files has been

[8] *See* K. Davis, Administrative Law of the Seventies, § 3A.38, at 44 (Cum. Supp. 1977).

given by Mr. Patriarca. Plaintiff argues that no such permission is required to disclose under FOIA because the Privacy Act contains an exception to the § 552a(b) requirement of permission, for disclosures "required under section 552 of this title [i.e. FOIA]", § 552a(b)(2), or made "pursuant to the order of a court of competent jurisdiction," § 552a(b)(11). Thus an agency which is required to disclose material under FOIA (that is material not covered by a FOIA exemption) can release it without bringing into play the requirement of § 522a(b) that permission first be obtained. Of course material actually withheld by an agency pursuant to a FOIA exemption is appropriately withheld under the Privacy Act as well. But material exempt from mandatory disclosure under FOIA, which an agency nonetheless chooses to disclose, does implicate the permission requirement of § 552a(b) since the disclosure of such material was not *required* by FOIA: disclosure was in the discretion of the agency. The excepting of material required to be disclosed under FOIA from the operation of the § 552a(b) permission requirement does not include discretionary decisions to disclose.[9] Since a civil action would lie for the discretionary disclosure of such infor-

[9] On its face the use of the word "required" seems clear enough and recourse to legislative history is inappropriate. We do note, however, that S.Rep. No. 93-1183, *reprinted in* [1974] U.S. Code Cong. & Admin. News, p. 6916, states that the disclosure requirements of the Privacy Act do not apply

> when the disclosure would be required *or permitted* by the Freedom of Information Act of 1966. This provision was included to meet the objections of press and media representatives that the statutory right of access to public records and the rignt to disclosure of government information might be defeated if such restrictions were to be placed on the public and press.
>
> While the Committee intends in this legislation to implement the guarantees of individual privacy, it also intends to make available to the press and public all possible information concerning the operations of the Federal Government in order to

mation without permission, a suit for declaratory judgment prior to a discretionary disclosure is also appropriate, 28 U.S.C.A. §§ 2201-02 (1976).

This Court concludes that Mr. Patriarca has standing to intervene and to assert claims arising under the fourth amendment, 5 U.S.C. § 552a and 5 U.S.C. §§ 702, 706, with jurisdiction conferred by 28 U.S.C.A. § 1331 (1976).

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prevent secret data banks and unauthorized investigative programs on Americans.

The Committee does not intend agencies to use the Freedom of Information Act as an excuse to avoid their obligations under this section to obtain informed consent .... *Id.* at 6985 (emphasis added).

In light of the general purposes of the Privacy Act "to promote governmental respect for the privacy of citizens," *id.* at 6916, the clear language of § 552a(b)(2) which reads "required" and not "required or permitted," and the legislative history which instructs agencies not to use FOIA so as to avoid their obligations under the Privacy Act, we believe that the proper reading of the Act gives Mr. Patriarca standing to challenge the disclosure of private information exempt under FOIA. Any other reading would permit the circumvention of the Privacy Act by the simple technique of seeking information, otherwise private, under FOIA. The interplay of FOIA and the Privacy Act permits an individual whose privacy is at stake to insist that a neutral magistrate superintend and permit disclosure of private matters only to the extent which valid public interests require. Disclosures made pursuant to court order are then exempt from the requirements of the Privacy Act, § 552a(b)(11). The only relevant case, construing the FOIA exemption of the Privacy Act, appears not to be inconsistent with this conclusion. *Tennessean Newspaper Inc. v. Levi,* 403 F. Supp. 1318 (M.D.Tenn. 1975); *cf. United States v. Brown,* 562 F.2d 1144, 1152 (9th Cir. 1977); *Sears, Roebuck & Co. v. G.S.A.,* 180 U.S.App.D.C. at 207, 533 F.2d at 1383; *Disabled Officer's Ass'n v. Rumsfeld,* 428 F. Supp. 454, 459 (D.D.C. 1977); *Christy v. United States,* 68 F.R.D. 375, 378 (M.D.Tex. 1975). It should also be noted that none of the exceptions to the applicability of the permission requirement, § 552a(b), contained in § 552a(j)(2), (k)(2) and regulations promulgated thereto, 28 C.F.R. §§ 16.71-16.101 (1976), appear to apply to the instant suit.

EXEMPTION III

Preliminary Questions No. 2 and 3, *supra*

Intervenor claims that FOIA exemption 3[10] precludes the compelled disclosure of the surveillance logs because such disclosure is specifically prohibited by Title III of the Om-

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[10] 5 U.S.C. § 552(b), (3) exempts, from the disclosure mandated by § 552(a), matters

specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Title III of the Omnibus Crime Control & Safe Streets Act of 1968 reads in pertinent part:

"contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication; § 2510(8).

Except as otherwise specifically provided in this chapter, any person who willfully discloses or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection ... shall be fined not more than $10,000 or imprisoned not more than five years, or both. § 2511(1)(c).

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter. § 2515.

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another in-

nibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1976).

1) FOIA exemption 3 exempts from disclosure matters specifically exempted from disclosure by some other statute, so long as that other statute leaves no discretion to officials as to whether those matters are to be withheld, or establishes particular criteria for withholding.

The plaintiff argues that the language of Title III is insufficiently specific to qualify under exemption 3, especially with regard to the definition of "contents" in § 2510(8). Plaintiff likens § 2511 to 18 U.S.C. § 1905 (1976) which criminalizes the disclosure of "confidential" information by federal officers and which has been held not to qualify under exemption 3.[11] Plaintiff also distinguishes the language of § 2511 from

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vestigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.
(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof. § 2517.
Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses [contents]. § 2520.

[11] *See Nat'l Parks and Conservation Ass'n v. Kleppe,* 178 U.S.App.D.C. 376, 389, 547 F.2d 673, 686 (1976); H.R.Rep. No. 94-880 Part I, 94th Cong., 2d Sess. 10 (1976), U.S. Code Cong. & Admin. News 1976, p. 2183, reprinted in Government in the Sunshine Act-S.5 Source Book: Legislative History, Texts and Other Documents (Joint Comm. Print) at 521 (Dec. 1976) (hereinafter 1976 Source Book).

other statutes deemed "specific" for exemption 3 purposes in the legislative history of the 1976 FOIA amendment.[12]

Intervenor notes the specific prohibitions in Title III against disclosure: § 2511(1)(C), imposing criminal sanctions, and § 2520, imposing civil sanctions, for the disclosure of the contents of oral communications intercepted in violation of the specific procedures established in §§ 2516, 2518. He points to §§ 2511(2), 2515, 2517 which detail the conditions under which disclosure may be made. These provisions, he correctly argues, leave no discretion as to whether interceptions may be withheld or disclosed.

Thus, exemption 3 criteria are met by Title III; and the contents of electronic surveillance conducted in violation of Title III are exempt from FOIA disclosure. The clear intent of Title III was to establish precise procedures[13] for the interception of oral communication and to establish the conditions for disclosure. The exact working of the statute precludes discretion. Whatever vagueness the definition of "contents" in § 2510(8) may involve, there is no doubt that Congress intended it to refer at least to the actual words and information obtained through surveillance. Nor is there involved in this case any disclosure of lawfully obtained information to other governmental units, § 2517(1), or other circumstances, §§ 2517(2), 2511(2), which might involve discretion.

2) However, the effective date of Title III was June 19,

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[12] *See* H.R.Rep. No. 94-880 Part I, 94th Cong., 2d Sess. 22-23 (1976) *reprinted in* 1976 Source Book at 533-34 (stating that under exemption 3 such statutes qualify as 42 U.S.C. §§ 2000e-5(b); 2000e-8(e); 2 U.S.C. § 437g(a)(3), 49 U.S.C.A. § 1461).

[13] *See United States v. Giordano,* 416 U.S. 505, 515, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) ("Congress legislated in considerable detail. . . .").

1968. This Title has not been applied retroactively.[14] Therefore it did not make the electronic surveillance at issue in this case illegal, and therefore subject to its specific criteria preventing disclosure.

Intervenor argues that the spirit of Title III requires its retroactive application in respect to FOIA exemption 3. He points to the great care which Congress took in Title III to protect privacy from electronic intrusions. In passing Title III prospectively, Congress acted against the background of the original and unamended version of FOIA exemption 7 which exempted *all* investigatory records from disclosure, without permitting any judicial balancing of interests to enter into the decision to withhold or disclose.[15] Thus, intervenor argues that Congress, when it enacted Title III, was assured that there would be no disclosure under FOIA of electronic surveillance conducted prior to the effective date of Title III. In amending FOIA exemption 7 in 1974[16] to provide for more disclosure, intervenor argues, Congress did not have in mind the ever-more-distant problem of pre-1968 illegal surveillance. Rather, it amended exemption 7 against the legislative background of Title III and exemption 3 which, it expected, would completely protect the privacy of all persons subjected to electronic surveillance.

This argument is compelling. But it is not for this Court to create exemptions to FOIA which are not there.[17] When Con-

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[14] *United States v. American Radiator & Sanitary Corp.*, 288 F. Supp. 701 (W.D.Penn. 1968).

[15] Freedom of Information Act, Pub.L. No. 89-554, 80 Stat. 383 (Sept. 6, 1966); Pub.L. No. 90-23 § 1, 81 Stat. 54 (June 5, 1967).

[16] Freedom of Information Act, Pub.L. No. 93-502 § 2, 88 Stat. 1561 (Nov. 21, 1974).

[17] The Supreme Court has said that FOIA mandates the fullest disclosure save for nine narrowly drawn statutory exemptions, not to be augmented by the courts: the Act reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language. . . . Congress provided in § 552(c) that nothing in the Act should be read to authorize withholding of information or limit the availability of records." *Dept. of Air Force v. Rose*, 425 U.S. 352, 360-61, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976).

gress amended exemption 3 in 1976, it gave no indication that statutes prohibiting disclosure were to be applied retroactively with regard to exemption 3.[18]

We conclude that the electronic surveillance at issue in this case is not exempt from disclosure pursuant to exemption 3. This case thus presents a difficult but narrow fourth amendment question with regard to the disclosure of electronic surveillance conducted in violation of the fourth amendment prior to June 19, 1968.

THE FOURTH AMENDMENT CLAIM

Preliminary Question No. 1

All parties agree that the electronic surveillance in issue violated the fourth amendment rights of Mr. Patriarca and others. *See United States v. Taglianetti*, 274 F. Supp. at 221-22, 226. The surveillance violated the warrant requirement; in addition, it appears that the breadth of the search in time and extent were per se unreasonable.[19]

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[18] Government in the Sunshine Act, Pub.L. No. 94-409 § 5(b), 90 Stat. 1247 (Sept. 13, 1976); *see* Conf. Rept. No. 94-1178, 94th Cong., 2d Sess. 24-25 (1976) and H.Rep. No. 94-880 Part I, 94th Cong., 2d Sess. 22-23 (1976), *reprinted in* 1976 Source Book at 806-07, 533-34.

[19] The surveillance required a physical intrusion on the premises of Mr. Patriarca, thus implicating the warrant clause under the then applicable rule of *Silverman v. United States*, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961). With regard to reasonableness, *see Katz v. United States*, 389 U.S. 347, 354-55, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Berger v. New York*, 388 U.S. 41, 58, 60, 87 S.Ct. 1873, 18 L.Ed.2d 1040; *id* at 65, 67, 87 S.Ct. 1873 (Douglas, J. concurring); *United States v. United States District Court*, 407 U.S. 297, 318, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972).

Because of this, intervenor claims that the fruits of that surveillance, the logs, should not be disclosed. He makes this claim as two separate defenses, asserting that Congress did not "contemplate materials gathered illegally and held illegally as those materials subject to the operation of the statute [FOIA]" and that "plaintiff is barred by estoppel from recovery (because) plaintiff is, in effect, seeking to benefit from the illegal, unlawful and wrongful conduct of another."

In response, the plaintiff asserts that FOIA cannot be construed to exclude the disclosure of illegally obtained information and that the fourth amendment exclusionary rule should not be imposed on the FOIA scheme of disclosure.

1) We reject Mr. Patriarca's contention that Congress did not intend disclosure of information which was obtained in violation of the law.[20] Mr. Patriarca points to no legislative history bearing on this question. Plaintiff, however, correctly points to the overwhelming evidence that Congress intended the broadest disclosure of *all* files,[21] especially disclosures which would bring to light official wrongdoing. Surely, Congress must have foreseen that wrongdoing might include the

[20] Intervenor also claims that Congress intended only information about the government and its processes and not information about individuals to be disclosed. The Supreme Court rejected this position by implication, in *Dept. of Air Force v. Rose,* 425 U.S. at 370-77, 96 S.Ct. 1592, by interpreting exemption 6 so as to avoid a blanket exemption of all personnel and medical files. *See also Getman v. N.L.R.B.,* 146 U.S.App.D.C. 209, 219 n.33, 450 F.2d 670, 680 n.33 (1971). *But cf. Ditlow v. Schultz,* 170 U.S.App.D.C. 352, 358, 517 F.2d 166, 172 (1975) (lesser public interest attaches to information unrelated to government processes).

[21] *See* H.R.Rep. No. 1497, 89th Cong., 2d Sess. (1966), U.S. Code Cong. & Admin. News 1966, p. 2418, *reprinted in* Freedom of Information Act Source Book: Legislative Materials, Cases, Articles (Senate Jud. Com.) at 22 (1974) therein after 1974 Source Book). S.Rep. No. 813, 89th Cong., 1st Sess. *reprinted in* 1974 Source Book at 45; 1974 Source Book at 83.

improper obtaining and maintenance of files by officials. The use of FOIA to bring to light information, including records tainted by illegality arising from "Watergate" wrongdoing, *see Congressional News Syndicate v. U.S. Dept. of Justice,* 438 F. Supp. 538 (D.D.C. 1977); *Tax Reform Research Group v. I.R.S.,* 419 F. Supp. 415 (D.D.C. 1976), received specific approval in the Congressional debates on the 1974 FOIA amendments.[22] Significantly, in those debates, Congressman Morehead also recognized that information obtained in an illegal national security intelligence investigation could be disclosed under FOIA.[23] Moreover, the Conferees for the 1974 amendments expressly approved, without addressing the legality of the information disclosed, the "present Justice Department policy waiving legal exemptions for withholding historic investigatory records over 15 years old, and they encourage its continuation."[24]

Illegality is not one of the nine FOIA exemptions, and the fact that illegality taints the information does not automatically put it beyond the requirement of disclosure. If such a limit on disclosure exists, it must derive not from FOIA, but from the superior force of the Constitution or another statute, it this case from the superior force of the fourth amendment.

2) The fourth amendment protects persons, not places, safeguarding the privacy of their lives from unreasonable governmental intrusion.[25] It secures this continuing protec-

[22] *See* FOIA and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Text and Other Documents (Joint Com. Print.) (1975) (hereinafter 1975 Source Book), at 467 (Senator Cranston), at 469 (Senator Bayh), at 477 (Senator Clark), at 436-40 (Senator Kennedy).

[23] 1975 Source Book at 391; *cf.* H.Rep. No. 94-880 Part I, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 Source Book at 522.

[24] Conf. Rep. No. 93-1380, 93d Cong., 2d Sess. (1974), *reprinted in* 1975 Source Book at 230.

[25] *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19

tion of privacy in two ways. First, it erects the exclusionary rule in the courtroom as a deterrent to the police. Second, it makes available, in a case such as this, outside the context of a trial, a remedy to prevent the unwarranted disclosure of information harmful to an individual's interest in his reputation or privacy.

Because the fourth amendment protects persons against intrusion on private places and conversations, even those carried on in the most public of phone booths, it surely follows that the fourth amendment has something to say about the reasonableness of the uses to which the state puts the seized information. Forbidding the state to wiretap a conversation, but providing no remedy when it not only wiretaps but discloses the contents of the conversation to the public would be to recognize a constitutional right without a concomitant remedy.[26] For if an initial intrusion invades privacy, the public disclosure of what is seized destroys it altogether. Moreover, without this penumbral protection for the seized information, the core fourth amendment right to be free of the initial intrusion would be less secure.[27]

L.Ed.2d 576 (1967); *see also, Boyd v. United States,* 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886) ("It is not the breaking of his doors and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security"); *Olmstead v. United States,* 277 U.S. 438, 477-85, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J. dissenting); *Poe v. Ullmann,* 367 U.S. 497, 548-52, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J. dissenting); *Mapp v. Ohio,* 367 U.S. 643, 656, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *id.* at 661, 81 S.Ct. 1684 (Black, J. concurring); *id.* at 666, 81 S.Ct. 1684 (Douglas, J. concurring); *Camara v. Municipal Court,* 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 Harv. L. Rev. 945 (1977).

[26] *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 392, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

[27] *Cf. Griswold v. Connecticut,* 381 U.S. 479, 482, 83, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Protection from disclosure may also be found in the fifth amendment due process clause which protects against arbitrary governmental action infringing liberty interests in privacy and reputation. *Cf. id.* at 499-502, 85 S.Ct. 1678 (Harlan, J. concurring).

That there is such a general rule of nondisclosure protecting the privacy of information also may be inferred from the broad prohibitions against disclosure in Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[28] and from a case such as *Nixon v. Administrator of General Services,* 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977). There the Court reviewed Richard Nixon's claim that a statute was unconstitutional which established procedures for the sorting of his documents and tapes produced while he was President, and for the Government's retention of those of public value. He claimed, in part, that the statute violated his fourth amendment and privacy rights in that it authorized a general search of papers which, while not in his possession, he had not abandoned, and which included many strictly " 'private communications between him and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts . . . .' " *Id.* at 459, 97 S.Ct. at 2798. In response, the Court wrote

> One element of privacy has been characterized as "the individual interest in avoiding disclosure of personal

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[28] *See United States v. Liddy,* No. 73-1020 (D.C. Cir. Jan. 10, 1973) (unpublished order) (granting intervenors' motion to prevent disclosure of contents of wiretaps of Democratic National Committee in prosecution of Gordon Liddy for engaging in illegal surveillance), *rev'g* 354 F. Supp. 217, 221 (D.D.C. 1973) (Sirica, J.). *Compare United States v. Liddy,* 166 U.S.App.D.C. 95, 509 F.2d 428, 446 (1974) ("order prohibiting disclosure of the contents . . . vindicated the rights of the movants without undue interference with the [sixth amendment] rights of the accused."), *with United States v. Cianfrani,* No. 77-2445 (3d Cir. 1978) 573 F.2d 835 (balancing sixth amendment interest in a public trial against Title III interest in non-disclosure).

matters. . . ." *Whalen v. Roe,* 429 U.S. 589, 599 [97 S.Ct. 869, 51 L.Ed.2d 64] (1977). . . . (A)t least when government intervention is at stake, public officials . . . are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity. *Id.* at 457, 97 S.Ct. at 2797.

Thus where Government intervention, such as a search and seizure, is involved, persons have a protectable interest as to the disclosure of matters related to their personal lives. Balancing the public's interest in the presidential materials against Mr. Nixon's expectation of privacy, the Court concluded that the intrusion of sorting the material was reasonable and that the precautions taken to prevent "unwarranted disclosure" or "undue dissemination", *id.* at 458, 97 S.Ct. 2777, of private materials were constitutionally sufficient.

That there is some protection from the improper disclosure of information is easier to determine[29] than how much protec-

[29] Plaintiff argues that in light of recent Supreme Court cases, *United States v. Janis,* 428 U.S. 433, 448-54, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976); *Stone v. Powell,* 428 U.S. 465, 486-89, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *United States v. Calandra,* 414 U.S. 338, 351-52, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), the fourth amendment does not bar the disclosure of information where no future deterrent effect on police infractions will result. While correctly describing what the Court has recently said, the plaintiff misconceives the context in which these cases were decided:

a) The Supreme Court was addressing, in some of these cases, only the exclusionary rule which has developed from the fourth amendment warrant clause. *See, e.g., Stone v. Powell, supra* (warrantless search, incident to an arrest made pursuant to an ordinance subsequently found to be unconstitutional; warrant supported by affidavit defective under *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969)); *United States v. Janis, supra* (defective affidavit by virtue of retroactive application of *Spinelli*); *see also Walder v. United States,* 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954) (warrantless search); *Brown v. United States,* 411 U.S. 223, 225, 229-30, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973) (defective warrant); *U.S. ex rel. Sperling v. Fitzpatrick,* 426 F.2d 1161 (2d Cir. 1970) (warrantless search). *But see United States v. Calandra,* 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (search may have been unreasonably broad; however, the exception created to exclusionary rule was in the context of a grand jury with another provision, Fed.R.Crim.P. 6(e), protecting privacy); *United States v. Schipani,* 435 F.2d 26 (2d Cir. 1970) *cert. denied,* 401 U.S. 983, 91 S.Ct. 1198, 28 L.Ed.2d 334 (1971) (search may have been unreasonably broad). The social costs appear especially high of enforcing the warrant clause exclusionary rule against evidence seized in searches which are reasonable in extent, reasonable in purpose and motive, reasonable by all standards but for a defective or missing warrant. But for a defect in procedure, highly probative evidence of serious crimes would be available for criminal enforcement purposes. This is the context in which the Court states that the chief rationale for the exclusionary rule is its future deterrent effect. The Court has, by and large, not addressed the general rule, derived from the reasonableness clause, which protects the privacies of life and a person's self respect by preventing the use of information for impermissible governmental objectives, and by preventing the disclosure of private information obtained by searches so broad and improper, in method, scope or purpose, that no warrant could ever issue to authorize them.

b) The plaintiff has overlooked a second aspect of the recent Supreme Court decisions by treating them as an absolute bar to the protection of private information by the fourth amendment. But those cases were only the result of the most careful balancing. *See Stone v. Powell,* 428 U.S. at 488, 96 S.Ct. 3037. This instant case must also be decided on the basis of a careful weighing of interests.

c) Even if plaintiffs were to hypothesize a system in which there were no exclusionary rule in criminal trials because of the overwhelming importance of obtaining highly probative evidence, their argument for completely abrogating the general rule against disclosure of private matters would not succeed. Safeguards exist in a criminal proceeding, other than the exclusionary rule, which protect a person's privacy and right to be free from the state's arbitrary use of private information. In a trial, the proposed

tion, for that requires the most careful balancing of interests, *see Stone v. Powell,* 428 U.S. 465, 488, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

In reaching such a constitutional balance, this Court would

consider what impact disclosure would have on deterring future fourth amendment violations. This deterrent rationale, which counsels exclusion in a courtroom of even highly probative evidence, does not counsel suppression in

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disclosure of each fact may be objected to, its justification in light of the valid state purpose of proving the elements of a crime must be set forth, and a neutral judge must determine that a proper, useful and not too prejudicial purpose would be served. Centuries of accumulated common law experience find expression in the rules of evidence which guide the release of information in the courtroom. Thus even without an exclusionary rule, wholesale disclosure, undirected to the proof of the elements of a crime and without any purpose but to prejudice the defendant, would still be prohibited in criminal trials. Where courts have permitted disclosure of illegally seized evidence in non-trial contexts, it has been with other appropriate safeguards. *See U.S. ex rel. Sperling v. Fitzpatrick, supra* (disclosure to parole board); *United States v. Schipani, supra* (disclosure to judge). . . . In *Whalen v. Roe,* 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), the Court stressed the importance of regulations and standards safeguarding the privacy of information retained by the state. There the Court reviewed the constitutional probity of a centralized computer system in which the State of New York compiles the names and addresses of all persons who obtain certain prescription drugs. Upholding the legitimacy of the system, the Court noted the careful procedures established by New York law which assure, through criminal penalties, that no public disclosure will occur. Moreover, the information is kept under tight security with only limited access permitted to select personnel. The Court stated that, "The enforcement of the criminal laws . . . require[s] the orderly preservation of great quantities of information, much of which is personal in character and protentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures." *Id.* at 605, 97 S.Ct. at 879. *See Nixon v. Administrator, General Services,* 433 U.S. 425, 457, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) (stressing importance of regulations assuring non-disclosure of private information).

Thus, the recent Supreme Court cases, while instructive on the deterrent rationale, do not foreclose this Court's protecting private information under the fourth amendment.

this case: for the surveillance occurred over twelve years ago and the F.B.I. has no interest in seeing these matters disclosed. Non-disclosure would have no deterrent effect. In fact, disclosure might well have a curative impact on police and prosecutorial wrong-doing and mistakes. For it might show the public that the F.B.I.'s reliance on illegal surveillance techniques altogether foreclosed its obtaining admissible evidence of crimes. Disclosure might also show other failures of investigation and prosecution. In reversing a district court's order which completely closed a suppression hearing to the press and public to safeguard privacy, the Third Circuit made a similar argument:

> [O]ften the only time that police conduct is scrutinzed in public is at a suppression hearing. The public has a vital interest in learning about the conduct of law enforcement officers . . . . Where there are allegations that the police have violated . . . [Title III], all citizens have a strong interest in learning the facts. This is especially true since electronic surveillance . . . takes place in secret . . . . *United States v. Cianfrani,* 573 F.2d at 850, (3d Cir. 1978).

Also favoring disclosure, in this constitutional balance, would be the significant public interest in Raymond Patriarca, a public figure of great notoriety for decades, whose privacy interests are thereby diminished. The public also has a significant interest in disclosures about public officials, and in information relating to official lawlessness, breach of the public trust, and webs of private corruption—all of which are allegedly contained in the logs.

Against these factors favoring disclosure would be Mr. Patriarca's reasonable expectation of privacy, although much attenuated by his status as a public figure and by the long passage of time since the surveillance occurred. In determining the extent of his privacy interest, we would have to consider not only his subjective expectation but the reasonable-

ness of it, in light of those constitutional decisions demarcating the private areas of life.[30]

But this Court need not strike a particular constitutional balance in this case, because Congress has already established a statutory scheme, in FOIA's exemption of investigatory files, the disclosure of which would be an unwarranted invasion of personal privacy. This satisfies the constitutional requirements. In FOIA, Congress has interposed a neutral magistrate to assure that no unreasonable disclosure of seized materials will take place. Guided by the FOIA standard "unwarranted invasion of personal privacy", as that clause is given meaning by the developing case law, this Court can strike a balance between the individual interest in privacy and the public's interest in disclosure, which will be reasonable and which will not breach Mr. Patriarca's constitutionally protected privacy interests.

3) In the alternative, we have concluded that Mr. Patriarca has waived his right to assert this fourth amendment claim, by failing to assert it in a timely fashion. While this Court could have reached that conclusion without first determining that a right to prevent disclosure in fact exists, it deemed prior discussion of the nature of the fourth amendment claim to be important. For the questions in this case are clearly suffused with constitutional overtones and an understanding of the constitutional context is important. Further, this case will likely be appealed and we think it important to reach the fourth amendment claim to facilitate review.

Since the existence of the bugging was first disclosed by the Government on December 27, 1966, over eleven years

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[30] *See, e.g., Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Doe v. Bolton,* 410 U.S. 179, 209, 215, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) (Douglas, J. concurring); *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Boyd v. United States,* 116 U.S. 616 S.Ct. 524, 29 L.Ed. 746 (1886); *see generally* Tribe, American Constitutional Law, at 886-990 (1978).

ago when the case of *Taglianetti v. United States* was on appeal, it has been open to Mr. Patriarca to sue under the fourth amendment for the return or sealing of the seized transcripts. *Go-Bart Importing Co. v. United States,* 282 U.S. 344, 358, 51 S.Ct. 153, 75 L.Ed. 374 (1931); *United States v. Calandra,* 414 U.S. 338, 354-55 n.10, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). Such suits may be maintained independently of a motion to suppress the use of the information at trial, *Cogen v. United States,* 278 U.S. 221, 225-26, 49 S.Ct. 118, 73 L.Ed. 275 (1929),[31] and may seek the return of copies, as well as the original, of the seized item.[32]

It will not do now, some 13 years after the last surveillance

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[31] *Burdeau v. McDowell,* 256 U.S. 465, 474, 41 S.Ct. 574, 65 L.Ed. 1048 (1921); *Wise v. Henkel,* 220 U.S. 556, 31 S.Ct. 599, 55 L.Ed. 581 (1911); *Dickhart v. United States,* 57 App.D.C. 5, 6, 16 F.2d 345, 346 (1926); *Dowling v. Collins,* 10 F.2d 62 (6th Cir. 1926); *In re Brenner,* 6 F.2d 425 (2d Cir. 1925); *United States v. Maresca,* 266 F. 713 (S.D.N.Y. 1920); *cf. Agnello v. United States,* 269 U.S. 20, 34-35, 46 S.Ct. 4, 70 L.Ed. 145 (1925); *Gouled v. United States,* 255 U.S. 298, 312-13, 41 S.Ct. 261, 65 L.Ed. 647 (1921); *United States v. Hee,* 219 F. 1019, 1020 (D.N.J. 1915). *But cf. Dier v. Banton,* 262 U.S. 147, 43 S.Ct. 533, 67 L.Ed. 915 (1923); *Lord v. Kelley,* 223 F. Supp. 684, 689 (D.Mass.) *appeal dismissed,* 334 F.2d 742 (1st Cir. 1964) *cert. denied,* 379 U.S. 961, 85 S.Ct. 650, 13 L.Ed.2d 556 (1965).

[32] *See, e.g., Hunsucker v. Phinney,* 497 F.2d 29, 34-35 (5th Cir. 1974) *cert. denied,* 420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975); *Goodman v. United States,* 369 F.2d 166, 168 (9th Cir. 1966); *United States v. Kraus,* 270 F. 578, 580-81 (S.D.N.Y. 1921) (Learned Hand, J.); *United States v. Lydecker,* 275 F. 976, 980 (W.D.N.Y. 1921) (copies of papers returned); *cf. Sullivan v. Murphy,* 156 U.S.App.D.C. 28, 58-59, 63, 478 F.2d 938, 968-69, 973, *cert. denied* (1973), 414 U.S. 880, 94 S.Ct. 162, 38 L.Ed.2d 125 (sealing arrest records, fingerprints and photos from illegal arrests); *Chastain v. Kelley,* 167 U.S.App.D.C. 11, 510 F.2d 1232 (1975); *G. M. Leasing Corp. v. United States,* 429 U.S. 338, 359, 97 S.Ct. 619, 632, 50 L.Ed.2d 530 (1977) ("The books and records were returned, and the [photocopies] concededly have been destroyed; that [fourth amendment] claim, thus, is moot.")

and 11 years after notice of the surveillance was given, for Mr. Patriarca to bring what is in effect a suit for the return or sealing of illegally seized information in the context of a FOIA proceeding.

The power of a court to hear a suit for a determination of the legality of a search and for the return of seized articles is a "continuing one." *United States v. Napela,* 28 F.2d 898, 903 (N.D.N.Y. 1928). However, "[e]ven the constitutional right to move for a return of property illegally seized . . . may be impaired, if not lost, when not seasonably asserted." *Id. See Weeks v. United States,* 232 U.S. 383, 398, 34 S.Ct. 341, 58 L.Ed. 652 (1914) ("seasonable application for their return"); *United States v. Hoyt,* 53 F.2d 881, 886 (S.D.N.Y. 1931); *United States v. O'Dowd,* 273 F. 600, 601 (N.D.Ohio 1921); *Commonwealth v. Fredericks,* 235 Pa.Super. 78, 340 A.2d 498 (1975); *cf.* Fed.R.Crim.P. 12(b)(3), (f).

Moreover, in *Patriarca v. Bork,* C.A. No. 5385 (D.R.I. Dec. 26, 1973) (Day, J. presiding), where Mr. Patriarca asserted a limited privacy right in these logs, he abandoned his right. There, Mr. Patriarca sought to enjoin the Attorney General from disclosing these same logs to the Rhode Island Parole Board, which was about to consider Mr. Patriarca for parole. While indicating his doubts as to the merits, Judge Day denied Patriarca's motion for a preliminary injunction on the basis of a jurisdictional defect in the pleadings and his failure to make out a case for preliminary relief. The parties agreed to settle the case as moot on January 21, 1974, after the parole board refused to review the tapes and denied parole. Clearly on notice that the logs might subsequently be disclosed to the parole board and to other persons, and clearly cognizant of available remedies, intervenor nonetheless chose to abandon his claim for permanent injunctive relief against all future disclosures and to abandon his right of appeal. This action shows clearly that his failure to assert his claim vigorously during these 11 years was not out of error or

ignorance; rather intervenor understood that remedies were available. It can only be concluded that there was "an intentional relinquishment or abandonment of a known right. . . ." *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

This Court, with its heavy press of judicial business, cannot permit the fragmentation of privacy claims which would permit a person to litigate a constitutional question each and every time disclosure by the Government to a new person or entity is threatened. Mr. Patriarca had the opportunity to have a definitive ruling or at least one which would have established the ground rules for any further assertion of his fourth amendment claim. He invoked this Court's jurisdiction and then did not press his claims through to a conclusion. He may not now, so many years after his claim arose, assert the claim again.

In his answer in this instant suit, Mr. Patriarca raised his constitutional claim in the form of an estoppel that plaintiff should not benefit from another's wrong. Whether intervenor framed his answer in this form because he too recognized that it was too late to assert his right to suppression is unclear. But this Court cannot, under FOIA, exercise its equitable discretion and tailor FOIA exemptions after our own equitable sense.

This Court concludes therefore that Mr. Patriarca has forfeited and waived whatever fourth amendment right he had to have the Government refrain from disclosing the illegally seized conversations and their fruits.

THE FIRST AMENDMENT AND DISCLOSURE

Preliminary Question No. 4, *supra*

Disclosure under FOIA advances important first amendment interests. It protects the public's right to know about public persons, official and unofficial. In this case disclosure

would give to one of our newspapers, representing the public's right to know, access to information held by the Government so that it can inform the public on matters of concern to them.

In various contexts, the Supreme Court has recognized that the right to know and to have access to information is an essential part of the first amendment.[33]

Through FOIA, Congress protected this first amendment interest and created a "clear right in the public and the press" to have access to information held by the Government.[34] In the original floor debates, Representative Moss affirmed that: "Inherent in the right of free speech and

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[33] *See, e.g,. Virginia State Bd. of Pharmacy v. Virginia Consumer Council, Inc.*, 425 U.S. 748, 764-65, 96 S.Ct. 1817, 48 L.ED.2d 346 (1975); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620-21 n.4 & 5, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1975); *Procunier v. Martinez*, 416 U.S. 396, 408-09, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 396, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969); *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); *Lamont v. Postmaster General*, 381 U.S. 301, 307-08, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965); *Martin v. Struthers*, 319 U.S. 141, 143, 63 S.Ct. 862, 87 L.Ed. 1313 (1943); *see also, Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S.Ct. 1678, 1680, 14 L.Ed. 2d 510 (1965) ("The State may not . . . contract the spectrum of available knowledge"); *Doe v. Bolton*, 410 U.S. 179, 209-11, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) (Douglas, J. concurring); *Kent v. Dulles*, 357 U.S. 116, 126, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958); *Marsh v. Alabama*, 326 U.S. 501, 505, 66 S.Ct. 276, 90 L.Ed. 265 (1946); *Thomas v. Collins*, 323 U.S. 516, 534, 65 S.Ct. 315, 89 L.Ed. 430 (1945); *Brooks v. Auburn*, 412 F.2d 1171, 1172 (5th Cir. 1969); Forkosch, Freedom to Hear: A Political Justification of the First Amendment, 46 Wash. L. Rev. 311 (1971).

[34] *See* 1974 Source Book at 2. H.Rep. No. 1497, 89th Cong., 2d Sess., *reprinted in* 1974 Source Book at 23; *Tennessean Newspapers, Inc. v. Federal Housing Ad.*, 464 F.2d 657, 660 (6th Cir. 1972).

of free press is the right to know. It is our solemn responsibility as inheritors of the cause to do all in our power to strengthen those rights. . . ."[35] Mr. King of Utah stated "If the people are to be informed, they must first be accorded the right to sources of knowledge. . . ."[36] The Senate Report to the 1974 amendments states, "Since the First Amendment protects not only the right of citizens to speak and publish, but also to receive information, freedom of information legislation can be seen as an affirmative congressional effort to give meaningful content to constitutional freedom of expression."[37] Senator Kennedy said in debate on the amendments,

> An important objective . . . is to give concrete meaning to one aspect of this [first amendment] right to receive information from the Federal Government. . . . The protections of the act thus become protections for the public's right to receive information and ideas. And the accomplishments of the act become fuller implementation of the first amendment of the Constitution.[38]

Moreover, the legislative history stressed the important democratic role the Act could play in informing the electorate. Accordingly, the legislative materials repeatedly quoted James Madison:

> A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And the people who mean to be their

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[35] 112 Cong. Rec. H-13007 (June 20, 1966), *reprinted in* 1974 Source Book at 47.

[36] *Id.* at 50.

[37] S.Rep. No. 93-854, 93d Cong., 2d Sess. 2, *reprinted in* 1975 Source Book at 154.

[38] Cong. Rec. S9310, S9343 (remarks of Senator Kennedy) (May 30, 1974), *reprinted in* 1975 Source Book at 284-85.

own Governors, must arm themselves with the power, which knowledge gives.[39]

Finally, the crucial role the press plays as a check upon governmental abuse and lawlessness was again and again cited in the legislative debate on FOIA. An awareness of Watergate wrongdoing and the role of the press in uncovering it pervaded the enactment of the 1974 amendments. In those debates, Senator Kennedy stressed the importance of the first amendment in securing honest government, and he quoted Justice Brandeis: "Publicity is justly commendable as a remedy for social and industrial disease. Sunlight is said to be the best disinfectant, and electric light the most effective policeman."[40]

This Court has the deepest conviction that a vigorous and free press, acting on the basis of the maximum access to governmental information, serves as a constant check on the excesses, mistakes and wrongdoing of all branches of government. Wherever possible and consistent with Congress' mandate and the first amendment, it is for the courts to further the freedom of the press to pursue vigorously its search for the truth.

However, I must advert to a spectre of abuse of the government's duty to disclose, which this decision calls to mind. Instead of protecting the right to know and facilitating a newspaper's access to governmental information, the improper disclosure of information can be used to threaten political expression and coerce conformity. We need only remember the FBI's surveillance of Martin Luther King and

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[39] Letter from James Madison to W. T. Barry, Aug. 4, 1822, in The Complete Madison (Padover ed.) (1953) at 337, *reprinted in* 1974 Source Book at 6.

[40] Cong. Rec. S9310, S9343 (remarks of Senator Kennedy) (May 30, 1974), *reprinted in* 1975 Source Book at 284-85. *Cf. United States v. Cianfrani*, 573 F.2d 835 at 846, 848, 852-854 (3d Cir. 1978).

the use of information or misinformation against him, and recall the burglary of Daniel Ellsberg's psychiatrist, which was carried out for the express purpose of obtaining information to leak to the press,[41] and note that the White House authorized the break-in and bugging of the Democratic National Committee and has used its access to various governmental agencies to gain information about those not in favor, to accept immediately the proposition that the executive's disclosure or threatened disclosure of information, improperly obtained or retained, can impair core first amendment rights.[42]

In this case, however, there is no evidence that information

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[41] *See United States v. Ehrlichman*, 178 U.S.App.D.C. 144, 149 n.6, 546 F.2d 910, 915 n.6 (1976) *cert. denied*, 429 U.S. 1120, 97 S.Ct. 1155, 51 L.Ed.2d 570 (1977) (testimony that "part of the purpose in examining [Ellsberg's psychiatrist's] files was to obtain information that could be made public through Congressional investigations, hearings or by release to the newspapers" so that those in the White House could "bring about a change in Ellsberg's image,"); *see also United States v. Liddy*, 177 U.S.App.D.C. 1, 3-4, 542 F.2d 76, 78-79 (1976); *United States v. Haldeman*, 181 U.S.App.D.C. 254, 278-279, 311-314, 559 F.2d 31, 55, 56, 88-91 (1976); *cf. Zweibon v. Mitchell*, 170 U.S.App.D.C. 1, 42-43 n.107, 516 F.2d 594, 635-36 n.107 (1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).

[42] Courts have demonstrated sensitivity to the first amendment and privacy problems surrounding the disclosure of personal information. *See, e.g., Socialist Workers Party v. Attorney General of the United States*, 510 F.2d 253, 257 (2d Cir. 1974), *stay denied*, 419 U.S. 1314, 95 S.Ct. 425, 42 L.Ed.2d 627 (1974) (Marshall, J. in Chambers); *Tarlton v. Saxbe*, 165 U.S.App.D.C. 293, 301, 507 F.2d 1116, 1124 (1974); *Boorda v. Subversive Activities Control Bd.*, 137 U.S.App.D.C. 207, 213, 421 F.2d 1142, 1148 (1969), *cert. denied*, 397 U.S. 1042, 90 S.Ct. 1365, 25 L.Ed.2d 653 (1970); *Halperin v. Kissinger*, 424 F. Supp. 838, 845 (D.D.C. 1976); *Menard v. Mitchell*, 328 F. Supp. 718, 726 (D.D.C. 1971), *rev'd*, 162 U.S.App.D.C. 284, 498 F.2d 1017 (1974). Various suits for damages, alleging the illegal collection and dissemination of information in violation of first amendment rights, have survived motions to dismiss. *See, e.g.,*

was obtained or retained for improper reasons under the first amendment. While public officials and figures were allegedly the subject of surveillance, there is no hint that this was undertaken because of their political beliefs or activities. Thus in this case, first amendment interests counsel not the withholding of information but its disclosure.

Resolution of the remaining claims of exemption, §§ 552(b)6, 4 and 7(c), are deferred pending discovery as requested by counsel.

In light of this Opinion, the Court considers the plaintiff's Renewed Motion to Require Preparation of Document Index and hereby orders that the defendants either consent to the preparation of such an index or file and serve a memorandum of law in opposition to that Motion, on or before May 25, 1978.

The plaintiff will prepare an order accordingly.

Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate, 519 F.2d 1335 (3d Cir. 1975); *Berlin Democratic Club v. Rumsfeld,* 410 F. Supp. 144, 150-51 (D.D.C. 1976); *Alliance to End Repression v. Rochford,* 407 F. Supp. 115, 117-18 (N.D.Ill. 1975); *Handschu v. Special Services Div.,* 349 F. Supp. 766, 768-70 (S.D.N.Y. 1972). Courts have also limited the power of Congress to expose information about persons, without a proper legislative purpose. *See, e.g., Kilbourn v. Thompson,* 103 U.S. 168, 26 L.Ed. 377 (1881); *Watkins v. United States,* 354 U.S. 178, 194, 200, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957), *cf. Barenblatt v. United States,* 360 U.S. 109, 153, 79 S.Ct. 1081, 3 L.Ed.2d 1115 (1959) (Black, J. dissenting); *id.* at 166, 79 S.Ct. 1081 (Brennan, J. dissenting). T. Emerson, The System of Freedom of Expression at 247-84 (1970).

Appendix D.

5 U.S.C. § 552

§ 552. [Public information; agency rules, opinions, orders, records, and proceedings]

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter

required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost

not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) (A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefitting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld

from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall

specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in

fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating,

or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a) (6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the result of each proceeding conducted pursuant to subsection (a) (4) (F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a) (4) (E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Appendix E.

18 U.S.C. §§ 2510-2520

§ 2510. [Definitions]

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communication by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative

or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

§ 2511. [Interception and disclosure of wire or oral communications prohibited]

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided,* That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, communication common carriers, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire or oral communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if the common carrier, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is re-

quired by law, that all statutory requirements have been met, and that the specified assistance is required.

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No communication common carrier, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished an order or certification under this subparagraph, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any violation of this subparagraph by a communication common carrier or an officer, employee, or agent thereof, shall render the carrier liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any communication common carrier, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of an order or certification under this subparagraph.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(e) Notwithstanding any other provision of this title or section 605 or 606 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter, or section 605 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications by a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information

deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power. [Repealed. Pub. L. 95-511, Title II, § 201(c), Oct. 25, 1978, 92 Stat. 1797.]

§ 2512. [Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited]

(1) Except as otherwise specifically provided in this chapter, any person who willfully—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire or oral communications,

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for—

(a) a communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

§ 2513. [Confiscation of wire or oral communication intercepting devices]

Any electronic, mechanical, or other device used, sent, car-

ried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

§ 2514. [Immunity of witnesses]

[Repealed. Pub. L. 91-452, Title II, § 227(a), Oct. 15, 1970, 84 Stat. 930.]

§ 2515. [Prohibition of use as evidence of intercepted wire or oral communications]

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court,

grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516. [Authorization for interception of wire or oral communications]

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h) or (i) of section

844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnapping and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 2517. [Authorization for disclosure and use of intercepted wire or oral communications]

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose

the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

§ 2518. [Procedure for interception of wire or oral communications]

(1) Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details

as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication under this chapter shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communication facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept

the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication under this chapter shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under

this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days

after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any wire or oral communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

§ 2519. [Reports concerning intercepted wire or oral communications]

(1) Within thirty days after the expiration of an order (or

each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature,

amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications pursuant to this chapter and the number of orders and extensions granted or denied pursuant to this chapter during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Court is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

§ 2520. [Recovery of civil damages authorized]

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall

(1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

Appendix F.

[SEAL]

OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

Matthew F. Medeiros, Esquire
One Hospital Trust Plaza
Providence, Rhode Island 02903

Oct. 21, 1977

Dear Mr. Medeiros:

You appealed on behalf of your client, the *Providence Journal-Bulletin,* from the denial by Director Kelley of your request for access to records of certain electronic surveillances conducted by the Federal Bureau of Investigation.

After careful consideration of this appeal, I have decided to affirm the initial action of Director Kelley, but to do so on narrow grounds. The records in question are clearly investigatory in nature and they were compiled for law enforcement purposes. Based on a review of these records by a member of my staff, however, it appears that there are no pending or contemplated law enforcement proceedings with which release would interfere. Accordingly, I have determined that 5 U.S.C. 552(b)(7)(A), one of the exemptions cited by Director Kelley, does not apply. I have also concluded that the records as to which he cited 5 U.S.C. 552(b)(7)(D) are actually outside the scope of your client's request, rendering that exemption inapplicable as well. As a result, I am affirming the initial action in this case solely on the basis that release of the requested records, or any reasonably segregable portion of them, would result in an unwarranted invasion of personal privacy. 5 U.S.C. 552(b)(7)(C).

In reaching the conclusion that these records should not be released, I have considered the public interest in their contents and the fact that your client would serve as a conduit

for the transmittal of this information to the public. Of overriding importance, however, is the fact that the conversations in question were intercepted in willful and flagrant violation of the Constitution and applicable Federal Law. The Government could not and cannot use this material in court in any way against the parties to these conversations or any of the persons mentioned therein. As a general proposition, the Government should not be allowed or forced to release unlawfully obtained evidence, thereby doing indirectly that which the law forbids doing directly. In my view, the privacy provisions of the Freedom of Information Act can properly be applied, and should be applied, to prevent such a result. As to individuals merely mentioned in the course of these intercepted conversations, this conclusion is reinforced when one considers who the sources of the references to them are, as well as the fact that the content of the references is unverified. On balance, it is my judgment that the public interest in the release of these materials, although substantial, is nonetheless insufficient to outweigh the personal privacy interests involved. Because the release of these materials is not required by the Freedom of Information Act, their disclosure as a matter of agency discretion is prohibited by the Privacy Act of 1974.

As you are aware, judicial review of my action on this administrative appeal is available to your client in the United States District Court for the judicial district in which it has its principal place of business, or in the District of Columbia, which is also where the records it seeks are located.

Sincerely,

Peter F. Flaherty
Deputy Attorney General
/s/ Quinlan J. Shea
By: Quinlan J. Shea, Jr., Director
Office of Privacy and Information
Appeals

Supreme Court, U. S.
FILED
DEC 13 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-673

PROVIDENCE JOURNAL COMPANY,
Petitioner,

—v.—

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
Respondents,

RAYMOND L. S. PATRIARCA,
Intervenor-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Intervenor-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Intervenor-Respondent, Raymond L. S. Patriarca, respectfully prays this Court to deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit to review the unanimous decision of that court in reversing the Final Judgment of the United States District Court for the District of Rhode Island granting declaratory judgment in favor of petitioner. The decision of the Court of Appeals is reported at 602 F.2d 1010 (1979), and that of the District Court at 460 F. Supp. 778 (D.R.I. 1978). On December 3, 1979, all nonfederal respondents were granted an extension of time to and including December 13, 1979, to file responses to the said Petition.

Jurisdiction

The District Court entered its Final Judgment granting declaratory relief to petitioner on October 5, 1978. See Appendix B to Petition for Writ of Certiorari (Petition). On July 27, 1979, the Court of Appeals issued its opinion reversing the said Final Judgment. See Appendix A to Petition. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to Title 28 U.S.C., Section 1254(1).

Question Presented

1. Whether the contents of wire or oral communications intercepted prior to June 19, 1968, the effective date of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, by means of an electronic, mechanical or other device in violation of the Constitution or Federal law are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552, on the ground that their disclosure would constitute an unwarranted invasion of personal privacy?

Constitutional and Statutory Provisions Involved

The Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Relevant portions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510-2520, appear as Appendices D and F to the Petition, respectively.

Statement of the Case

In general, intervenor-respondent concurs in the Statement of the Case as set forth in the Petition at pp. 2-6. However, he does not agree with petitioner's assertions that "[T]here is no evidence in the record as to whether the surveillance violated the Fourth Amendment," *Ibid*, p. 3, fn. *, inasmuch as the Travel of *United States* v. *Taglianetti*, 274 F. Supp. 220, 226 (D. R.I. 1967), *aff'd*, 398 F.2d 558, 569 (1st Cir. 1968), *aff'd per curiam*, 394 U.S. 316, 317 (1969), clearly reveals that the electronic surveillance here involved was illegal.* Furthermore, he takes issue with the contention that the Court of Appeals reversed *"on a ground that had not been urged or briefed by any of the parties at any stage of the litigation."* *Ibid.*, p. 6 (italics in original). It is the claim of intervenor-respondent that the Court of Appeals adopted, under a narrowing principle, the essential spirit of his argument that, given the specific facts of this case, disclosure should be prohibited where the requested material has been illegally obtained. As the Court of Appeals put it, "Moreover, the circumstances of this case are unique and present a particularly compelling argument for considering the manner in which the information was obtained." *Ibid.* at 1014.

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* The Court of Appeals referred to the method of obtaining the requested material as having "violated the Fourth Amendment." 602 F.2d at 1011. Moreover, during oral argument below, as well as on many occasions in the past, the government conceded the illegality of the said surveillance, "Here the FBI has conceded that the surveillance was 'in willful and flagrant violation of the Constitution and applicable Federal Law.'" 602 F.2d at 1013.

Reasons for not Granting the Writ

I. The Court of Appeals Properly Reconciled All of the Various Competing Interests Here Involved.

Confronted with a variety of conflicting claims, the Court of Appeals correctly reconciled them by holding, in brief, that, "by passing Title III . . . Congress had decided that the right to privacy created by illegal electronic surveillance is too great to permit any disclosure of the fruits of such surveillance." 602 F.2d at 1013. While the court did not, *in haec verba*, adopt the full argument of intervenor-respondent that illegally obtained material is not disclosable under the relevant FOIA provisions, it reached the same result by finding, under the within facts and circumstances, that it was unthinkable that a Congress which enacted Title III could countenance a forced disclosure of material obtained by the FBI "in willful and flagrant violation of the Constitution and applicable Federal law." 602 F.2d at 1013. Under such circumstances, the First Circuit would—and did—afford critical weight "to a deliberate policy statement of Congress *relative to the precise circumstances we face here.*" *Id.* (emphasis added).

CONCLUSION

To grant the petition for certiorari would be to put in doubt the narrow issue decided by the Court of Appeals which leaves for another day and an appropriate case the broad question of "a new, general exemption for illegally obtained information." 602 F.2d at 1014. It decides only that the "contents" of "wire" or "oral" communications interrupted in violation of the Constitution or federal law prior to the effective date of Title III may not be involuntarily disclosed by the agency responsible

for its interception. *Id.* Such a ruling is both reasonable and equitable. The issue before this Court, and the only one reasonably susceptible to review on the record below, is far narrower than petitioner would have it believe and, in the view of respondent-intervenor, was correctly resolved by the Court of Appeals.

Respectfully submitted,

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Dated: New York, New York
December 11, 1979

Supreme Court, U. S.
FILED
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No. 79-673

In the Supreme Court of the United States

OCTOBER TERM, 1979

PROVIDENCE JOURNAL COMPANY, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner contends that the court of appeals erred in concluding that certain records of the Federal Bureau of Investigation compiled as a result of an illegal electronic surveillance are exempt from disclosure under Exemption 7(C) of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(7)(C).

1. Between March 1962 and July 1965, the FBI recorded conversations inside the business office of respondent Raymond L.S. Patriarca by means of an electronic listening device secretly implanted without a warrant (Pet. App. 17-18). Before erasing those tape recordings, FBI agents compiled some 2,000 documents comprising more than 7,000 pages (*id.* at 18). It is these documents that are the subject of this litigation.

The FBI documents reflect the conversations that took place in respondent Patriarca's business office over a three-year period. In a few instances, portions of those conversations, and some complete conversations, are set forth verbatim (A. 113).[1] For the most part, however, the conversations are summarized or restated in the words of the FBI agent who prepared the documents (A. 113-114). The documents largely contain "raw, uncorroborated information" (A. 114).

In November 1976, petitioner submitted a request under the FOIA seeking disclosure of these FBI records (Pet. App. 18). The Director of the FBI denied petitioner's request, relying on Exemptions 7(A), (C), and (D) (*ibid.*). On petitioner's administrative appeal, the Department of Justice in October 1977 affirmed the FBI's decision to withhold the records on the basis of Exemption 7(C) (*ibid.*; *id.* at 121-122).[2]

In August 1977 petitioner ~~then~~ brought this lawsuit in the United States District Court for the District of Rhode Island against the FBI and the Department of Justice, and respondent Patriarca subsequently intervened as a defendant (Pet. App. 18, 66). On cross-motions for summary judgment, the district court ruled that, with the limited exception of certain matters relating to respondent Patriarca's private family life and the identities of FBI agents and informants, the requested FBI records must be released (*id.* at 19, 43-51).[3]

[1]"A." refers to the Consolidated Appendix submitted in the court of appeals.

[2]Exemption 7(C) excludes from disclosure "matters that are investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would constitute an unwarranted invasion of personal privacy." 5 U.S.C. 555(b)(7)(C). See also *Department of Air Force* v. *Rose*, 425 U.S. 352, 378-379 n.16 (1976).

[3]The First Circuit granted a stay of the district court's order pending appeal (Pet. App. 19).

The court of appeals reversed the judgment of the district court, holding "that the FBI may properly turn down this FOIA request under Exemption 7(C)" (Pet. App. 25). In reaching this conclusion, the court recognized that the statute calls for a "balancing process to determine whether, under Exemption 7(C), production of records would constitute an 'unwarranted invasion of personal privacy' " (*id.* at 20). In undertaking this "balancing process," the court turned to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, which it found to be "a deliberate policy statement of Congress" that "sheds light on the meaning of the phrase ['unwarranted invasion of personal privacy']" in the context of records generated by electronic surveillance and, therefore, "should not be ignored" (Pet. App. 22).

The court of appeals reasoned that "Congress, by passing Title III, has already balanced the same kind of factors that must be balanced under Exemption 7(C)" in this case and has "decided that the risk to privacy created by illegal electronic surveillance is too great to permit any disclosure of the fruits of such surveillance" (Pet. App. 23). Finding that the surveillance here "was exactly the kind of 'insidious invasion of privacy' that Congress 'singled out for special scrutiny and safeguards' " in Title III, the court concluded that "[i]ntrusions before 1968 were no less insidious than intrusions after 1968, and to the extent reasonable, the victims should be protected from disclosure after 1968 in accordance with Congress' stated policy (*ibid.*). Thus, "given the circumstances of this case," the court of appeals adopted the balance that had been struck by Congress under Title III and determined that disclosure

of the requested FBI records—the fruits of an unconstitutional electronic surveillance—"would * * * constitute an unwarranted invasion of personal privacy" within the meaning of Exemption 7(C) (*ibid.*).[4]

2. The decision of the court of appeals is correct and does not warrant review by this Court. The First Circuit properly adhered to the balance of competing interests that had been reached by Congress in enacting Title III with regard to records generated by electronic surveillance. The court, quoting from *Gelbard* v. *United States*, 408 U.S. 41, 48 (1972) (footnote omitted), accurately observed that "the protection of privacy was an overriding congressional concern" under Title III (Pet. App. 20). And the court correctly recognized, as stated in *United States* v. *United States District Court*, 407 U.S. 297, 302 (1972), that Title III "represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression" (Pet. App. 20). See also *United States* v. *Cianfrani*, 573 F. 2d 835, 856 (3d Cir. 1978).[5]

---

[4]The government has long acknowledged that the electronic surveillance of respondent Patriarca was conducted in a manner violative of the Fourth Amendment. See *United States* v. *Taglianetti*, 274 F. Supp. 220 (D. R.I. 1967), aff'd, 398 F. 2d 558, 569-572 (1st Cir. 1968), aff'd per curiam, 394 U.S. 316 (1969); see also Pet. App. 122. As the district court in the present case expressly observed, "[a]ll parties agree that the electronic surveillance in issue violated the fourth amendment rights of Mr. Patriarca and others. * * * The surveillance violated the warrant requirement; in addition, it appears that the breadth of the search in time and extent were per se unreasonable" (Pet App. 71; footnote omitted). The court of appeals similarly remarked that this "surveillance violated the Fourth Amendment" (*id.* at 18; see also *id.* at 23).

[5]As the Third Circuit observed in *Cianfrani* (573 F. 2d at 856):

> Congress's overriding interest in protecting privacy to the maximum extent possible is evident in Title III. The legislative history of the statute emphasizes the concern of its drafters that the Act preserve as much as could be preserved of the privacy of communications, consistent with the legitimate law enforcement needs that the statute also sought to effectuate. Similarly, the complex and overlapping provisions are strong evidence that Congress intended to regulate strictly disclosure of intercepted communications, limiting the public revelation of even interceptions obtained in accordance with the Act to certain narrowly defined circumstances.
>
> Moreover, protection of the privacy of communications is vital to our society. We depend upon the free interchange of ideas and information. And we are dedicated to the proposition that each individual should be free from unwarranted intrusion into his private affairs. Both these interests are threatened by modern techniques of electronic surveillance, however, since it is now possible to record surreptitiously the most intimate conversations and to preserve them for later disclosure. Only by governing strictly both authorization and disclosure of intercepted communications did Congress believe that such weighty interests could be protected adequately.

Given the clear congressional policy in Title III against the disclosure of the kind of information contained in the records sought by petitioner in this case,[6] the court of appeals' conclusion that disclosure of such information "would constitute an unwarranted invasion of personal privacy" under Exemption 7(C) is fully justified. As the court stated, "[t]here is no reason for us to think that what Congress in 1968 considered so unwarranted

[6]Petitioner acknowledges (Pet. 12) that Title III was enacted largely to address Fourth Amendment concerns. As the Court noted in *United States* v. *United States District Court*, *supra*, 407 U.S. at 302, "[m]uch of Title III was drawn to meet the constitutional requirements for electronic surveillance enunciated by this Court in *Berger* v. *New York*, 388 U.S. 41 (1967), and *Katz* v. *United States*, 389 U.S. 347 (1967)." It would be odd indeed if invasions of privacy substantial enough to violate the Fourth Amendment were not of sufficient magnitude to permit non-disclosure under Exemption 7(C). This is particularly true in a case involving the illegal interception of oral or wire communications.

an invasion of privacy that its fruits should be kept secret would not still be so considered in 1974 when Congress created Exemption 7(C)" (Pet. App. 22; footnote omitted).

Furthermore, there is no conflict among the circuits on the question presented in this case, and the court of appeals remarked that its "holding is not broad" (Pet. App. 24). The court limited its decision to FOIA requests for "the 'contents' of 'wire' or 'oral communications' 'intercepted' before June 19, 1968, by means of an 'electronic, mechanical, or other device' * * * in violation of the Constitution or federal law" (*id.* at 25; footnote omitted). Thus, the decision is confined to the "unique * * * circumstances of this case" involving "this narrow class of information" (*id.* at 24) and does not affect the general application of Exemption 7(C).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

JANUARY 1980

DOJ-1980-01